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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-228

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, *Petitioner*

vs.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

HARRY R. HORROW
NOBLE K. GREGORY
STEPHEN J. MARTIN
225 Bush Street
San Francisco, California 94104
Attorneys for Petitioners

PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, California 94104
Of Counsel

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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vs.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Claims

Petitioner Bank of America National Trust and Savings Association, a National Banking Association, prays that a writ of certiorari issue to review a judgment of the United States Court of Claims that certain foreign taxes paid by petitioner were not income taxes and accordingly, were not available for credit against petitioner's Federal income tax liability.

OPINIONS BELOW

The Opinion of the Court of Claims is reported at 459 F.2d 513. That Opinion, together with the court's findings and conclusions, is printed as Appendix A hereto. The report of the Trial Commissioner to the Court of Claims is printed as Appendix B.

JURISDICTION

The Court of Claims rejected the position of its Trial Commissioner and determined that the foreign taxes paid by petitioner were not income taxes, in an opinion (Appendix A) which was filed and entered on May 12, 1972, as a final judgment dismissing petitioner's claims for the years 1960 and 1961. The judgment of the court dismissing all but one minor claim for the year 1959 (Appendix C) was filed and entered on July 21, 1972.

The jurisdiction of this Court is invoked pursuant to section 1255(1) of Title 28 of the United States Code.

QUESTION PRESENTED

Whether foreign taxes paid by petitioner, which were direct taxes imposed on its gross income from interest, banking fees and gains from dealing in foreign exchange, received in the course of its general banking business operated at branches in the taxing countries, were "income taxes" within the meaning of section 901(b)(1) of the Internal Revenue Code.

STATUTE INVOLVED

This case involves interpretation of subsections (a) and (b)(1) of section 901 of the Internal Revenue Code of 1954 (26 U.S.C. § 901)[1] which is set out in Appendix D hereto.

STATEMENT OF THE CASE

In two consolidated cases, the first involving the taxable years 1959 and 1960, and the second involving the year 1961, petitioner filed suit for refund of a total of $226,334.99 plus interest, representing Federal taxes overpaid in those years. Petitioner is a national banking association with its principal office in San Francisco, California. During the taxable years, petitioner conducted a general banking business from its branches in Bangkok, Kingdom of Thailand; Manila, Republic of the Philippines; and Buenos Aires, Argentine Republic. It derived revenue in those countries in the form of interest from commercial, real estate, and personal loans of foreign borrowers; net gains from dealing in foreign exchange; and fees or other charges for trust department or for property management services, and for issuance of letters of credit, guarantees, traveler's checks, trade acceptances, cashier's checks, and the like.

Petitioner accrued and paid to the Governments of the three countries annual taxes calculated as flat percentages of petitioner's gross revenue from sources specified in the foreign law: interest, discounts, commissions, fees,

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[1]References hereinafter to sections are to sections of the Internal Revenue Code (26 U.S.C.), unless otherwise indicated.

and net gains from foreign exchange. As the Court of Claims held, these were all direct taxes on the petitioner's gross income from its banking business and were not franchise, privilege or excise taxes (Appendix A, page 8).

Petitioner duly claimed credit against its United States income tax liability, pursuant to section 901(b). Respondent disallowed the claimed credit, but, in lieu thereof, allowed the taxes as a deduction in calculating petitioner's taxable income. After its claims for refund were denied petitioner filed suit in the Court of Claims pursuant to section 1491 of Title 28 of the United States Code and section 7422 of the Internal Revenue Code (26 U.S.C. § 7422).

Except for a small amount of Thailand tax imposed under another statute, which respondent admitted was a true income tax,[2] the lower court held that none of petitioner's gross income taxes qualified as "income taxes" under section 901 of the Code and none were available for credit against its United States income tax liability. Judgment was entered accordingly.

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[2]When the cases were before the Court of Claims, they also involved petitioner's claims that a Municipal Tax and a Receipts Tax levied in Thailand, an Argentine tax on petitioner's capital and reserves, and an Argentine tax in the nature of a social security tax were available for credit, but upon an adverse finding by the Trial Commissioner, petitioner abandoned those claims, and they are not here involved, even though they were included for completeness in the lower court's opinion.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW HAS FRAMED A NOVEL, CONFUSING AND ERRONEOUS TEST FOR DETERMINING WHAT CONSTITUTES INCOME TAXES PAID OR ACCRUED TO A FOREIGN COUNTRY UNDER SECTION 901 OF THE INTERNAL REVENUE CODE. ITS DECISION CONFLICTS WITH A LONG LINE OF PRIOR CASES AND RULINGS.

Section 901 of the Internal Revenue Code allows a credit against United States income tax of "the amount of any income * * * taxes paid or accrued during the taxable year to any foreign country" (§ 901(b)(1)). The Court of Claims determined that the foreign taxes in question were "all in substance levied on the taxpayer's gross income from its banking business carried on by its branch in the particular country." (Appendix A, page 8) and were direct levies on income—not privilege or excise taxes (Appendix A, page 11). It held, however, that the test of whether such a foreign tax is an income tax under section 901 is whether that tax "is very highly likely, or was reasonably intended, always to reach some *net* gain in the normal circumstances in which it applies" (Appendix A, pages 14 and 15; emphasis added).

The foregoing test was not suggested by any prior decision or ruling, and is contrary to the basic concept of an income tax as enunciated by this and other courts: Income for the purposes of income taxation in the United States is not limited to *net* gain or *net* profits. A tax imposed on gross income is an income tax.

An income tax is a direct tax on income (*Brushaber v. Union Pac. R. R.* (1916) 240 U.S. 1, 17-19). Gain—not merely *net* gain—is the equivalent of income (*Eisner v. Macomber* (1920) 252 U.S. 189, 207). Gain or gross in-

come is determined by subtracting from gross proceeds the cost of goods sold but not selling expenses, losses, etc. (*Doyle v. Mitchell Brothers Co.* (1918) 247 U.S. 179, 185; Income Tax Regs., § 1.61-3(a)).[3] Deductions from gross income are a matter of legislative grace—for Congress to grant or take away as it thinks best; the allowance of deductions is not an essential element of an income tax (*New Colonial Co. v. Helvering* (1934) 292 U.S. 435, 440; *Deputy v. du Pont* (1940) 308 U.S. 488, 493). Thus, as the court below recognized, there are Federal income taxes imposed on gross income (Appendix A, pages 21 to 23). For example, the portion of the social security tax imposed by section 3101 on wages received by employees (residents) which is paid by the employee is an income tax on gross income (*Helvering v. Davis* (1937) 301 U.S. 619, 635; *Cain v. United States* (5 Cir. 1954) 211 F.2d 375, 377). And section 881(a)(1) of the Code imposes a flat 30 per cent income tax, without deductions, on the gross annual or periodic income derived from United States sources by foreign corporations not engaged in business in this country.

Likewise the Internal Revenue Service has held over and over again that certain foreign gross income taxes were subject to credit against the United States income

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[3]Plaintiff is engaged in the banking business. It derives its income from the employment of capital and the performance of services, or both. It does not sell goods and consequently incurs no deduction which is equivalent to a manufacturer's or merchant's deduction for cost of goods sold. The expenses incurred in performing services or in making loans are for purposes of the United States Income Tax, simply deductions from gross income and are not factors in arriving at gross income (Income Tax Regs. § 1.61-3 (a)).

tax.[4] These rulings can be searched in vain for any hint that respondent concerned itself with whether the foreign tax was "very highly likely, or was reasonably intended always to reach some *net* gain in the normal circumstances to which it applies" (Appendix A, pages 14 and 15). The foreign taxes involved were simply recognized as taxes on gross income, and were held, accordingly, to be income taxes available for credit.

In *Seatrain Lines, Inc.* (1942) 46 B.T.A. 1076, the Board of Tax Appeals held that a Cuban tax of 3% of the gross income of an American concern picking up and delivering freight and passengers in Cuba was a creditable income tax. The Board based its decision on the ground that the Cuban tax on gross income was a tax on Seatrain's "gain," i.e., on its income within the United States concept of income. After quoting from this Court's decision in *New Colonial Co. v. Helvering,* (1934) 292 U.S. 435, 440, to the effect that under our laws the power to tax income extends to gross income and that the allowance of deductions depends on legislative grace, the Board said:

> "Thus, although deductions may be allowed, the [foreign] tax remains an income tax because it is

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[4]Some examples are G.C.M. 6042 (1929) C.B. VIII-1, 184 (Chilean withholding tax on interest and dividends); I.T. 2620 (1932) C.B. XI-1, 44 (Mexican tax on gross interest, rents, wages, and net capital gains); I.T. 3385, C.B. 1940-1, 102 (Mexican gross income tax on interest); G.C.M. 25723, C.B. 1948-2, 131 (Philippine income tax on capital gains); I.T. 4013, C.B. 1950-1, 65 (Brazilian tax on gross earnings of nonresidents); I.T. 4025, C.B. 1950-2, 50 (Peruvian gross income tax on Peruvian credit operations); Rev.Rul. 66-65, C.B. 1966-1, 175 (Phillipine tax on annual or periodical Phillipine income of nonresident corporations); Rev. Rul. 69-446, C.B. 1969-2, 150 (Swiss withholding tax on interest and dividends).

> levied on income and not on the privilege of doing business. *If no deductions were permitted by statute the tax would still be an income tax*" (46 B.T.A. 1081) (emphasis added).

The Tax Court reaffirmed this holding that a foreign tax on gross income was an income tax, (*Santa Eulalia Mining Co.* (1943) 2 T.C. 241, 245, acquiescence).[5] The court below erroneously attempts to fit the *Seatrain* case within its concept of a *net* income tax by referring to the fact that the Cuban gross income tax had replaced a tax on net profits. The prior Cuban tax history was used in *Seatrain*—not to suggest that a gross income tax was really a net income tax—but solely to rebut a contention that the Cuban tax was an excise tax. Here, as the court below recognized, the taxes in question were direct levies on income and not excise taxes (Appendix A, page 11).

In *Biddle v. Commissioner* (1938) 302 U.S. 573, involving the claim of a shareholder of a British corporation of a credit against United States income tax for a British tax paid on his dividends, this Court held that the standard which must be applied to a foreign tax for the purpose of determining whether it is an income tax is to be found in our laws. It said the

> "phrase 'income taxes paid', as used in our own revenue laws, has for most practical purposes a well understood meaning to be derived from an examina-

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[5]This Court has long recognized the Tax Court as a body possessed of special expertise in its field, whose decisions are thereby entitled to special weight (*Dobson v. Commissioner* (1943) 320 U.S. 489, 498-499).

tion of the statutes which provide for the laying and collection of income taxes" (302 U.S. 579).

The court below misinterpreted this as referring to a tax on *net* gain because, since 1913, the domestic levy of the U.S. income tax has been directed at net gain or net profit (Appendix A, page 12). That is not the test which this Court announced in *Biddle*. The test is whether the foreign tax laws match the United States concept of what is income for income tax purposes.

In announcing its amorphous test of the "likelihood of reaching some net gain," the court below makes no real effort to explain how that test can square with the definition of income laid down by this Court for constitutional purposes. (*Eisner v. Macomber* (1920) 252 U.S. 189, 207; *Doyle v. Mitchell Brothers Co.* (1918) 247 U.S. 179, 189); or with the definition of *gross* income in section 61 of the Internal Revenue Code to mean "all income from whatever source derived". Nor does it explain how a tax on such gross income can nevertheless be excluded from the category of "income tax" for the purpose of section 901 of the Code. Departing entirely from the concept of an income tax which has been worked out by this Court and the lower courts, the court below has sought to replace it with an ephemeral requirement of "some *net* gain or profit" which cannot be derived from any concrete income tax provisions.

While the court's opinion discusses many prior cases, close examination reveals that it is citing them, not for support, but merely to show that they do not directly reject the test it advances. The reason is that such a

test was never suggested to them. It is a creation of the Court of Claims.

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2. THE ENDLESS CONFUSION AND THE DOUBLE TAXATION WHICH WILL NECESSARILY RESULT FROM THE DECISION OF THE COURT OF CLAIMS WILL ACT AS A SERIOUS DETERRENT TO FOREIGN TRADE.

The decision by the Court of Claims will inevitably cast the determination of credits for foreign income taxes into a state of confusion. The novel test for a creditable income tax propounded by the court requires resolution of these imponderables: the foreign country's "intention" in enacting the tax; the degree of likelihood that it applies to some net gain; the extent to which the "net gain" taxed can vary from our concept of "taxable income"; and the "normal" circumstances of the application of the foreign tax.[6] The novel test laid down will require that the Revenue Service re-examine dozens of prior rulings on foreign tax laws. What is more, confusion as to the status of existing rulings will be compounded by confusion surrounding the status of numerous foreign taxes around the world that the Internal Revenue Service has never had occasion to rule on.[7]

---

[6]The difficulty of applying the confusing new test is aptly demonstrated by the lower court's failure to apply it properly to the taxes this petitioner paid in each country on foreign exchange profits, *after* deducting its cost of goods sold—a clear equivalent to our capital gains alternative tax, which allows no further deductions (Rev.Rul. 56-247, C.B. 1956-1, 383; see G.C.M. 25723, C.B. 1948-2, 131).

[7]The Commissioner's *Preliminary Report—Statistics of Income—1969 Corporation Income Tax Returns* reflects nearly 4 billion dollars in foreign tax credits claimed on corporate returns for the most recent period reviewed.

The lower court's decision misconceives the purpose of section 901 of the Code, and its interplay with section 904 (see Appendix A, page 13, footnote 8), the latter is the device by which Congress assures that a taxpayer's income from United States sources will not be relieved of domestic tax through offset by foreign losses or through high foreign effective rates of tax, whether occasioned by failure to grant deductions or otherwise. Instead of carrying out the purpose of Congress in relieving a taxpayer who satisfied the section 904 test from the burden of double taxation, the court's opinion sanctions domestic and foreign taxation of the same foreign income merely because the foreign income base is broader than ours.[8]

Unless set aside by this Court, the decision below will present a serious obstacle to foreign trade, and to business operations of United States citizens and corporations in foreign countries. At a time when the Administration and the Congress are bending every effort to stimulate foreign trade, it is important for this Court to reject the confusing and restrictive interpretation by the court below of the term "income taxes" in the foreign tax credit provisions.

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[8]The Treasury Department now concedes that a foreign tax may qualify for credit, using the carryover provisions of section 904, even though the foreign tax is imposed on income which is *wholly exempt* from the United States tax (Rev.Rul. 72-126, I.R.B. 1972-12, 9).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY R. HORROW

NOBLE K. GREGORY

STEPHEN J. MARTIN

Attorneys for Petitioners

PILLSBURY, MADISON & SUTRO

Of Counsel

(Appendices Follow)

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Appendix A

IN THE

United States Court of Claims

Nos. 184–68 and 138–69

(Decided May 12, 1972)

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION v. THE UNITED STATES

Harry R. Horrow, attorney of record, for plaintiff. *Stephen J. Martin, David L. Klott,* and *Pillsbury, Madison & Sutro,* of counsel.

Michael H. Singer, with whom was *Assistant Attorney General Scott P. Crampton,* for the defendant. *Philip R. Miller,* of counsel.

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, and KUNZIG, *Judges.*

OPINION

DAVIS, *Judge,* delivered the opinion of the court:*

For a domestic corporation, § 901 (a) and (b)(1) of the Internal Revenue Code of 1954 allows a credit against federal income taxes of "the amount of any income, war

*We are grateful for the opinion of Trial Commissioner Roald A. Hogenson, from which we have borrowed, though we reach a different result on the issues contested before the judges (Parts II, III, and IV, *infra*).

profits and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States * * *."[1] Bank of America National Trust and Savings Association, organized under the laws of the United States with its principal office at San Francisco, seeks judgment in these consolidated cases for refund of income tax for its taxable years 1959, 1960, and 1961. It challenges the determination of the Internal Revenue Service that certain foreign taxes paid for these periods were not "income taxes" within § 901(b)(1), and hence not to be treated as foreign tax credits against plaintiff's income tax liability pursuant to § 901(a). No 184–68 covers 1959 and 1960, while No. 138–69 concerns 1961. The foreign taxes involved were paid, for all three years, to the Kingdom of Thailand and the Republic of the Philippines, and also to the Philippines for 1958.[2]

---

[1]Section 901 provides insofar as relevant:

"(a) *Allowance of credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) * * *

"(b) *Amount allowed.*—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *"

[68A Stat. 285 (1954), as amended by section 3(a), Act of September 14, 1960, P.L. 86–780, 74 Stat. 1010, 1013 (1960). Section 3(a) of the Act of September 14, 1960, amended subsections (a) and (b) of section 901 by striking out "the limitation of section 904." 74 Stat. at 1013. Section 4 of that Act provided that the amendment applied with respect to taxable years beginning after December 31, 1960. *Ibid.*]

[2]1958 is involved only because of a Philippines tax credit carryover from that year to 1959.

For 1961, taxes were also paid to the Republic of Argentina.

In each of these countries, plaintiff conducted a general banking business from a branch office. These were located at Bangkok, Thailand; Manila in the Philippines; and Buenos Aires, Argentina. In each nation, this business included, but was not limited to, the making of commercial, real estate and personal installment loans, the rendering of trust department and property management services, foreign exchange transactions, the issuance of letters of credit, guarantees, travelers checks and cashiers' checks, and acceptance of trade paper.

With respect to this banking business, Bank of America paid the three jurisdictions various types of taxes. The findings detail the names of those imposts and the amounts paid. It is enough to say here that in each country plaintiff paid the general income tax imposed on corporations operating there.[3] In addition, taxpayer paid other tolls.

Demand for credit under § 901 of most of these assessments was made either on the federal income tax returns or by refund claim.[4] After consideration, the Revenue Service allowed (except for a small inadvertent error which the parties have corrected by stipulation) the following of the foreign taxes as credits against plaintiff's

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[3]In Thailand this was the Companies Income Tax; in the Philippines, the Tax on Foreign Corporations; in Argentina, the Corporation Income Tax.

[4]Plaintiff uses the accrual method and is on the calendar year basis.

federal income tax liabilities for the taxable years: Thailand Companies Income Tax and Profit Remittance Tax, Philippines Tax on Foreign Corporations, and Argentina Corporation Income Tax and Excess Profits Tax. This treatment is not disputed. In addition, the parties have agreed that the Philippines Residence Tax was not creditable but was properly allowed as a deduction under § 164.

When the case was submitted to the trial commissioner, the following taxes remained in dispute:

> Kingdom of Thailand: Business Tax, Type 1 and Type 2, Municipal Tax, and Receipts Tax.
>
> Republic of the Philippines: Tax on Banks.
>
> Republic of Argentina: Tax in Substitution of Surcharge on Free Transfer of Property, City of Buenos Aires Tax on Profit-Making Activities, and Contribution to the Bankers' Institute for Social Services.

The trial commissioner denied taxpayer the right to recover with respect to the Thailand Municipal Tax, the Thailand Receipts Tax, the Argentina Tax in Substitution of Surcharge on Free Transfer of Property, and the Argentina Contribution to the Bankers' Institute for Social Services. Plaintiff has not sought review of those rulings and thereby acquiesces in them. We agree with the trial commissioner's discussion on that aspect of the case, and in Part I of this opinion, *infra*, adopt it (with slight modifications) as our own.

The trial commissioner held, however, for plaintiff on the other taxes: the Thailand Business Tax, Type 1 and Type 2; the Philippine Tax on Banks; and the City of Buenos Aires Tax on Profit-Making Activities. We dis-

agree with that position and in Parts II, III, and IV, *infra,* give our reasons for holding against plaintiff on those levies.

I.

With respect to the four foreign taxes (two imposed by Thailand and two by Argentina) which Trial Commissioner Hogenson believed not to be creditable under § 901, we concur that the Bank of America has failed to meet its burden of proof or persuasion[5] that any of those assessments is an "income tax" accrued and payable to a foreign country. It is now settled that the question of whether a foreign tax is an "income tax" within § 901(b)(1) must be decided under criteria established by our revenue laws and court decisions, and that the foreign tax must be the substantial equivalent of an income tax as the term is understood in the United States. *Missouri Pacific R.R. v. United States,* 183 Ct. Cl. 168, 175, 392 F. 2d 592, 597 (1968); *Allstate Ins. Co. v. United States,* 190 Ct. Cl. 19, 27, 419 F. 2d 409, 413–14 (1969).

On the Thailand Municipal Tax and the Thailand Receipts Tax, plaintiff cites no provisions of the translated portions of The Revenue Code of Thailand attached to the stipulation of facts, nor are any provisions found there, which seem to pertain to those laws. There is no

[5]Rule 125 of this court provides that the determination of foreign law shall be treated as a ruling on a question of law, but the court or trial commissioner, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 133, the reception of evidence rule.

other testimony or evidence concerning the nature of the taxes. Taxpayer's position is that those taxes present no independent legal issues since allegedly each is calculated as a flat percentage of plaintiff's annual liability for the Thailand Business Tax, citing Rev. Rul. 70–21, 1970–1 Cum. Bull. 158, for the proposition that, in that situation, the creditability of the dependent foreign tax depends upon the creditability of the principal tax. In response to defendant's correct assertion that no evidence was adduced as to the nature of those taxes, nor as to the nature of plaintiff's liability for such taxes, plaintiff's reply was that the determination of foreign law is a question of law as to which the court and the trial commissioner may consider relevant materials from any source. Efforts by the trial commissioner to obtain a reliable and authoritative translation of such laws proved unsuccessful. Rule 125 cannot reasonably be interpreted to shift the burden onto the court or the trial commissioner to search for documentation necessary for determination of a question of foreign law, particularly in the circumstances where the litigant before the court conducts a business in the foreign country, subject to its laws.

On the Argentina Tax in Substitution of Surcharge on Free Transfer of Property, it is sufficient to observe that that tax is levied upon a corporate taxpayer annually at the rate of 1 percent of its capital and reserves. Plaintiff has wholly failed to show how or in what respect the tax was imposed upon its Argentina income in 1961. Plaintiff's distress is expressed by the statement in its opening brief to the trial commissioner that it was unsuccessful in obtaining from its Argentine office the de-

tails of the computation of the allegedly creditable and noncreditable portions of the tax.

The Argentina Contribution to the Bankers' Institute for Social Services is obviously a social security revenue measure. The Bankers' Institute, an instrumentality of the government of Argentina, administers a social security program within the banking industry. The revenue is basically derived from compulsory contributions of employees and employers within the banking industry, with the respective contributions being 2 percent of monthly salaries received and paid. By amendment effective March 7, 1957, each bank was required to pay contributions equal to 2 percent of the total amounts received by it in respect of interest and commissions. The proof with respect to the amendment is fragmentary, and plaintiff's position cannot be sustained that the 1957 amendment repealed the previous provisions imposing contributions upon the employer to match the required contributions of employees. In any event, the tax of 2 percent of amounts received by a bank by way of interest and commissions, which tax was in whole or in part the compulsory contributions of the bank to funds otherwise contributed by the bank's employees to sustain a government social security program for bank employees, cannot be equated to an income tax under United States concepts.

II.

There is greater difficulty in disposing of the three taxes the trial commissioner held creditable: the Thailand

Business Tax, Type 1 and Type 2; the Philippines Tax on Banks; the Buenos Aires Tax on Profit-Making Activities.

A. From the unchallenged findings and the presentations of the parties, we are justified in assuming that these were all in substance levies on the taxpayer's gross income from its banking business carried on by its branch in the particular country. Plaintiff has not proved otherwise or offered to prove otherwise. Defendant now accepts that description of the tax.

Section 78 of the Thailand Business Tax defines persons engaged in business as those listed in the Business Tax Rate Schedule of The Revenue Code of Thailand, and states that such persons have the duty to pay business tax on the "gross takings" for each tax month at the rates provided in the schedule. Section 79 defines "gross takings" from the business of banking as (a) interest, discounts, fees or service charges, and (b) profit, before the deduction of any expense, from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

As to the category of business designated as "banking," the Business Tax Rate Schedule describes such business as savings banks other than that of the government, commercial banking under the law on commercial banking or the business of those who regularly do business similar to that of a commercial bank such as lending money, giving guarantees, currency exchange, issuance, purchase or sales of notes, foreign remittance by various means.

The Business Tax Rate Schedule imposes taxes of two designated types described as follows:

Type 1 Interest, discounts, fees or service charges.

Type 2 Profit before the deduction of any expenditure from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

For Type 1 of the Business Tax on banking, the designated rate of tax is 2.5 percent of gross takings, and for Type 2, 10.5 percent of gross takings. Obviously, the tax is imposed upon a broad spectrum of the business activities of a bank.

The City of Buenos Aires Tax on Profit-Making Activities, in Article 115, imposes a tax on the gross receipts of banks, insurance, savings and loan and security and investment companies, and in Article 121 provides that, in the case of banks and other lending institutions, "the taxable amount shall be composed of interest, discounts, profits from non-exempt taxable securities and other revenue, resulting from profits and remuneration for services received in the course of the last business year."

The Philippines Tax on Banks provides in § 249 that there shall be collected a tax of 5 percent on the gross receipts derived by all banks doing business in the Philippines from interest, discounts, dividends, commissions, profits from exchange, royalties, rentals of property, real and personal, and all other items treated as gross income under § 29 of the National Revenue Code. Section 29 defines "gross income" as gains, profits, and income derived from any source whatever.

For none of the three taxes was the taxpayer permitted to deduct from gross income the costs or expenses of its banking business or of producing its net income.

B. The problem, then, is whether such imposts on gross banking income, of this character, are "income taxes" under the foreign tax credit (§ 901(b)(1))—"income taxes" as we use that term in the federal system under our own revenue laws. (The bank does not contend that it is entitled to credit for these taxes, under § 903, as taxes "paid in lieu of a tax, on income, war profits, or excess profits otherwise generally imposed by any foreign country.")

There is consensus on certain basic principles, in addition to the rule that the United States notion of income taxes furnishes the controlling guide. All are agreed that an income tax is a direct tax on gain or profits, and that gain is a necessary ingredient of income. See *Stratton's Independence, Ltd. v. Howbert,* 231 U.S. 399, 415 (1913); *Brushaber v. Union Pacific R.R.,* 240 U.S. 1 (1916); *Eisner v. Macomber,* 252 U.S. 189, 207 (1920); *Keasbey & Mattison Co. v. Rothensies,* 133 F. 2d 894, 897 (C.A. 3), *cert. denied,* 320 U.S. 739 (1943). Income, including gross income, must be distinguished from gross receipts which can cover returns of capital. *Doyle v. Mitchell,* 247 U.S. 179, 185 (1918); *Allstate Ins. Co. v. United States,* 190 Ct. Cl. 19, 27, 419 F. 2d 409, 414 (1969); 1 Mertens, Law of Federal Income Taxation § 5.10 at 35–36 (1969). Only an "income tax", not a tax which is truly on gross receipts, is creditable.

We can also put aside as irrelevant to this case the frequent controversy whether the foreign tax is a direct

income tax or a privilege, excise, or similar tax which happens to be measured by income.[6] The Thailand, Philippine, and Argentine bank taxes, whether or not they were "income taxes" for foreign tax credit purposes, were admittedly direct levies and not franchise, privilege, or excise taxes. But they were not imposed upon and limited to net gain.

The trial commissioner and the taxpayer say that this kind of direct gross income tax is nevertheless allowable under § 901(b)(1) because, in their view, gross income taxation (apparently any type of gross income tax) falls under the United States concept of an income tax. They emphasize that the Supreme Court has suggested that the Sixteenth Amendment extends the federal taxing power to gross income (*New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1934); *Deputy v. du Pont,* 308 U.S. 488, 493 (1940));[7] that several federal taxing provisions are levied on gross income; that prior court decisions under the foreign tax credit have permitted use of certain foreign gross income assessments; and that Internal Revenue Service rulings have upheld the crediting of some foreign taxes levied on gross income. The generalization

[6]See, *e.g., Keasbey & Mattison Co. v. Rothensies,* 133 F. 2d 894, 897, 898 (C.A. 3, 1943), *supra; New York & Honduras Rosario Min. Co. v. Commissioner,* 168 F. 2d 745 (C.A. 2, 1948); *Commissioner v. American Metal Co.,* 221 F. 2d 134, 137–40 (C.A. 2), *cert. denied,* 350 U.S. 829 (1955); *Eitingon-Schild Co. v. Commissioner,* 21 B.T.A. 1163 (1931); *Mallouk v. Commissioner,* 34 B.T.A. 269 (1936).

[7]This was the statement in the *New Colonial Ice Company* case: "The power to tax income like that of the new corporation [the taxpayer there] is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

the plaintiff and the trial commissioner draw is that all gross income taxes (as distinguished from gross receipts levies) come within § 901(b).

For the reasons elaborated in this and the succeeding sections of this opinion, we cannot accept the position that all foreign gross income taxes, no matter whether or not they tax or seek to tax profit or net gain, are covered by that provision. True, the Supreme Court has indicated, somewhat cursorily, that Congress may impose gross income taxes, but the full ramifications of that observation are as yet unknown since Congress has not yet sought in its income tax legislation to disregard net gain entirely. On the contrary, from 1913 on, Congress has always directed the domestic levy at some net gain or profit, and for almost 60 years the concept that the income tax seeks out net gain has been inherent in our system of taxation. That is the "well understood meaning to be derived from an examination of the [United States] statutes which provide for the levying and collection of income taxes"—the basic test set forth in *Biddle v. Commissioner,* 302 U.S. 573, 579 (1938), for determining whether a foreign tax is an "income tax" under the foreign tax credit.

Similarly, it comports better with the dominant purpose of the credit to avoid or minimize double taxation of income (*Burnet v. Chicago Portrait Co.,* 285 U.S. 1, 7 (1932); *Hubbard v. United States,* 84 Ct. Cl. 205, 212–13, 17 F.Supp. 93, 96 (1936), *cert. denied,* 300 U.S. 666 (1937); *Commissioner v. American Metal Co.,* 221 F. 2d 134, 137 (C.A. 2), *cert. denied,* 350 U.S. 829 (1955)) to refer to the actual system historically utilized by Con-

gress in imposing domestic income taxes rather than to some potential and unused, though constitutionally permissible, scheme of gross income taxation. Where the gross income levy may not, and is not intended to, reach profit (net gain), allowance of the credit would serve only haphazardly to avoid double taxation of net income, since only the United States tax—under the concept followed since 1913—would necessarily fall upon such net gain. There would not then be any significant measure of commensurability between the two imposts (except by chance).[8] See, also, Owens, *The Foreign Tax Credit* (1961) 85, 86.

We do not, however, consider it all-decisive whether the foreign income tax is labeled a gross income or a net income tax, or whether it specifically allows the deduction or exclusion of the costs or expenses of realizing the profit. The important thing is whether the other country is attempting to reach some net gain, not the form in which it shapes the income tax or the name it gives. In certain situations a levy can in reality be directed at net gain even though it is imposed squarely on gross income. That would be the case if it were clear that the costs, expenses, or losses incurred in making the gain would, in all probability, always (or almost so) be the lesser part of the gross income. In that situation there would always

[8]In seeking to reduce double taxation, Congress has not required that the foreign income tax be levied at the same rate as the United States income tax. The limitation on the credit established by § 904 of the Code can serve to prevent, to a certain degree, the off-setting of the foreign tax where there is no parallel income subject to domestic tax. But if foreign gross income levies were automatically creditable there would still be very many situations in which the § 904 limitation would permit a credit despite the absence of any comparable taxable income under our income tax law.

(or almost so) be some net gain remaining, and the assessment would fall ultimately upon that profit.

For instance, it is almost universally true that a wage or salary employee does not spend more on expenses incident to his job than he earns in pay. A foreign tax upon the gross income of an employee from his work should therefore be creditable by the employee under § 901(b)(1) despite the refusal of the other jurisdiction to permit deduction of job-related expenses. The reason is, of course, that in those circumstances the employee would always (or almost always) have some net gain and, accordingly, the tax, though on gross income, would be designed to pinch net gain in the end—and would in fact have that effect. In those circumstances, a loss (excess of expenses over profit) is so improbable, and some net gain is so sure, that the tax can be placed on gross income without any real fear or expectation that there will be no net gain or profit to tax.[9]

III.

This has been the underlying theory, as we see it, of the decisions, rulings, and legislation which both parties invoke. Sometimes the phrasing of the opinions and rulings has been overly broad or too narrow, but in each instance the core of the holding harmonizes with the principle that a direct income tax is creditable, even though imposed on gross income, if it is very highly likely, or was reasonably intended, always to reach some

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[9]The Revenue Service has held foreign taxes measured by remuneration received by employees to be creditable. Owens, *The Foreign Tax Credit* (1961) 47. See also note 18, *infra*.

net gain in the normal circumstances in which it applies—otherwise the gross income tax is not creditable.

Decisions: This was plainly so with the two court decisions on which taxpayer mainly rests: *Seatrain Lines, Inc. v. Commissioner,* 46 B.T.A. 1076 (1942), and *Santa Eulalia Mining Co. v. Commissioner,* 2 T.C. 241 (1943). The former held creditable a Cuban tax of 3 percent of the American company's gross income from its transportation business in Cuba. But the Board of Tax Appeals carefully pointed out (46 B.T.A. at 1080-81) that originally Cuba levied a 6 percent tax on net profits and "the 3 percent by which the original 6 percent rate was reduced was apparently an approximation of the deductions allowed in arriving at net income and was adopted as a compromise measure in order to avoid the complex and vexatious allocation and calculation of the deductible items peculiar to the petitioner's business. Therefore, it appears that as to petitioner's business the present 3 percent tax is but the successor of the 6 percent income tax, took its place in the tax structure of Cuba, and preserved its character as an income tax." *Commissioner v. American Metal Co.,* 221 F.2d 134, 140 (C.A. 2, 1955), *supra,* referred to this *Seatrain* Cuban impost as a "formulary" income tax—a gross income tax which embodies within itself (via the rate or otherwise) consideration of the taxpayer's relevant costs and expenses.[10]

Santa Eulalia allowed the credit for a Mexican gross income tax on mining royalties, but the taxpayer did not operate the mine, retaining only the royalty right under

[10]Other examples of "formulary" net income taxes are noted in Owens, *The Foreign Tax Credit* (1961) 44–46.

its contract with the operator,[11] and it seems very clear that no costs or expenses *of the taxpayer* in obtaining the royalties were likely to outbalance those gains; the taxpayer itself would not suffer a deficit on the royalty transaction even if the mining operations went badly, whatever might be true of the operator.

Conversely, the decisions cited by the defendant, all denying the credit, are consistent with the allowance of the credit for a gross income tax where that tax is sure or highly likely to reach some net gain. *Keasbey & Mattison Co. v. Rothensies, supra,* 133 F.2d 894—aside from the point that the issue on which it turned was whether the Quebec mining tax was a privilege or an income tax, see note 6, *supra*—involved a mining business which obviously could either have lost or made money in any particular year. In that context, it was significant that "the expenses incident to the general conduct of the business, as distinguished from the costs incurred in the mining operation, are not deductible" (133 F. 2d at 898); those non-deductible expenses could easily have made the difference between a net profit and a loss. For that business it could not possibly have been said that the tax would always, or almost always, reach some net gain.

Commissioner v. American Metal Co., supra, 221 F. 2d 134, held squarely that the foreign tax was a levy on the privilege of mining which became due irrespective of the realization of cash proceeds and "even if the individual miner makes no profits—even if having severed the ore, he makes no sales." 221 F. 2d at 138, 139; see note 6,

[11] In computing the royalty, the operator deducted certain expenses, including a production tax paid to Mexico.

supra. There, too, mining was involved, with its recognized hazard of gain or deficit, and nothing substantial appears in the opinion to suggest that all gross income taxes were automatically excluded from the credit, no matter what their impact or what kind of income-producing activity was implicated. On the other hand, the theme of the court's discussion does run directly counter to plaintiff's latitudinarian insistence that all gross income taxes are covered by § 901.[12]

Our own decision in *Allstate Ins. Co. v. United States*, 190 Ct. Cl. 19, 419 F. 2d 409 (1969), likewise concerned a business in which a loss was quite possible, and the opinion was naturally directed to a gross income or gross receipts tax imposed in that type of industry. As the court said, that company "may have had a gain or it may have a loss in operating its insurance business during the year in question, but this would not affect the premiums tax it had to pay. This tax would have accrued and plaintiff would have been liable for it even if its business which produced the premiums had been operated at a loss", 190 Ct. Cl. at 28, 419 F. 2d at 414.

The opinion also noted that "It is clear that if a tax is to qualify as an income tax within the meaning of Section 901 of the Code, it must have some relation to gain, profit or loss of the taxpayer. It is not enough if it is merely a tax on income, such as an excise, sales, or gross

[12]Defendant also cites *United States v. Waterman S.S.*, 330 F. 2d 128 (C.A. 5, 1964), *aff'd on other issues*, 381 U.S. 252 (1965), but that decision is wholly inapposite since it involved only the "in lieu" provision of § 903 and a foreign privilege tax which the court held had not been shown to have been levied in lieu of an otherwise generally imposed income or profits tax. No issue was presented as to § 901(b)(1).

receipts tax, without regard to these other factors." 190 Ct. Cl. at 29, 419 F. 2d at 415. The *Allstate* decision thus plainly rejects the view that every foreign tax on gross income is creditable, even where net gain is not in fact taxed. But the opinion did not hold or say that a gross income tax which does (and is highly likely to) reach some net gain is also outside of § 901.

While the defendant would push *Allstate* into an exclusion of all gross income taxes *per se*, the trial commissioner and the plaintiff seek to distinguish *Allstate*, equally incorrectly, on a very special ground. That case dealt with a Canadian tax on the gross premiums collected in Canada by an Illinois stock casualty insurance concern. The suggestion is that the decision turned on the *sui generis* taxation of insurance companies in this country, which excludes "unearned premiums" from taxable income (§ 832 of the Internal Revenue Code; Treas. Reg. § 1.801-3(e)).[13] The simple answer is that the opinion and decision were not rested on that narrow basis but on more general principles which are correct and applicable to the present case. There is no reason to repudiate that reasoning by putting *Allstate* on a different ground which the court did not choose or consider when the case was decided.

The few Tax Court rulings on which the Government calls also fit with the principle that the key is the effect

[13]As the trial commissioner put it in his opinion below: "In light of the statutory scheme represented by section 822 for determining the gross income of certain insurance companies, it is clear that the Canadian tax on the gross amount of premiums collected which failed to take such items as unearned premiums into account was a tax on gross receipts as distinguished from a direct tax on income within our concepts."

of the foreign tax on net gain, not simply whether the tax is in form on gross or net income. *Eitingon-Schild Co. v. Commissioner*, 21 B.T.A. 1163 (1931), characterized the French turnover tax as "an excise tax on the privilege of carrying on in France businesses of the kinds enumerated" (21 B.T.A. at 1174), measured by gross sales or gross receipts (see note 6, *supra*), and concluded: "The tax is not laid upon income or profits, either actual or fictitious, nor is the determination of the amount of the tax in any wise dependent upon the amount of income derived or profits earned" (21 B.T.A. at 1175). This position is neither a rejection nor an acceptance of all gross income taxes.

The recent opinion in *F. W. Woolworth Co. v. Commissioner*, 54 T.C. 1233, 1260–61 (1970), did no more than hold (so far as now pertinent) that a British tax on the rental value of property was not an "income tax" within our concept because it attributed that income "notionally" to an owner who never rented the property but occupied it himself. In saying that our concept of "income" is "based upon gain or profit realized by the taxpayer (*i.e.*, net income as opposed to gross income, gross sales, or some other basis)", the court obviously meant only that net gain is at the heart of our idea of the income tax. It did not mean to overrule the principle of *Seatrain* and *Santa Eulalia, supra*, crediting gross income taxes where it was clear that taxpayers subject to the tax would regularly have net gain and the gross income tax would therefore reach a residue of net income.

Rulings: Plaintiff insists that a number of Revenue Service pronouncements support its position that gross

income taxes, as a general class, fall under § 901(b)(1), but we understand these rulings as showing—like the court decisions we have just discussed—no more than that such levies are creditable if they plainly put the bite on some net income or profit.

I.T. 2620, 11–1 Cum. Bull. 44 (1932),[14] and I.T. 3385, 1940–1 Cum. Bull. 103, credited a Mexican tax on receipts in the form of interest or rents, which was deducted and withheld at the source. Though these summary rulings do not detail their reasoning, we believe the Service must have assumed that such interests and rents, taxed at the source, are rarely, if ever, wholly offset by the taxpayer's costs or expenses of obtaining that type of income. See *Missouri Pacific R.R. v. United States, supra,* 183 Ct. Cl. at 176, 392 F. 2d at 598: "* * * these rulings seem to place in a special category income from interest and rents, as if this type of increment from capital represents a classical flow of 'income' which requires no deductions."

In the same fashion, I.T. 4013, 1950–1 Cum. Bull. 65, dealing with a Brazilian tax on gross earnings from interest and dividends, also withheld at the source, treated that type of passive investment income as involving few or no expenses of production. The ruling said (1950–1 Cum. Bull. at 66) that the provisions of the foreign tax "assume the aspects of Sections 211 and 231 of the [1939] Internal Revenue Code with respect to the taxa-

[14] I.T. 2620, *supra,* and I.T. 4025, *infra,* were declared obsolete in Rev. Rul. 70–293, 1970–1 Cum. Bull. 282. A declaration of obsolescence means that a particular ruling is no longer determinative with respect to future transactions. It does not mean that the conclusion or underlying rationale has no current applicability Rev. Proc. 67–6, 1967–1 Cum. Bull. 576.

tion of gross income of nonresident alien individuals and nonresident foreign corporations." As we discuss *infra*, the postulate of those provisions of the domestic Code is that such nonresident taxpayers have few or no offsetting costs or expenses in this country or connected with income-producing activity here.

The last foreign tax credit ruling in which the plaintiff (and the trial commissioner) rely is I.T. 4025, 1950–2 Cum. Bull. 50,[15] crediting Peruvian taxes, likewise collected by withholding, on "income" derived from credit operations, as well as "income" derived by residents abroad from Peruvian rural and urban property, noncommercial professional profits, and compensation for personal services. The ruling is very short, without any satisfactory explanation, but there is no intimation that the foreign tax, which was on "income" and "profits", is on gross income, without deductions. Moreover, in major respects the tax related to income obtained by nonresidents, and the same comment applies as we have just made about the other 1950 ruling involving nonresidents.[16]

Domestic taxes: There are some minor federal income taxes imposed on gross income—plaintiff urges them strongly as analogies or exemplars—but here, too, we judge that Congress has used a gross income levy only in those instances in which it seemed clear that costs and expenses within this country (or affecting the production of the income in this country) would not wipe out net gain.

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[15]See note 14, *supra*.

[16]For other IRS rulings with some bearing on the problem, see Owens, *The Foreign Tax Credit* (1961) 37 *ff*. We believe that the result in none is inconsistent with our analysis.

Sections 871 and 1441 of the Internal Revenue Code impose a tax on certain non-business gross income of nonresident aliens from investments, compensation, etc. The assumption is, as we understand it, that such nonresident taxpayers, not engaging in business here, are very unlikely to have expenses which will reduce to zero their net gains from the taxed items. A like assumption underlies § 881(a)(1) imposing a 30 percent tax on the gross income from similar investment sources in this country by a foreign corporation "but only to the extent the amount so received is not effectively connected with the conduct of a trade or business within the United States."[17] For a foreign corporation connected with United States business, § 882 imposes the tax on taxable income, after deductions related to the United States activities (with the exception that charitable contributions need not be so related). The normal expectation is, of course, that taxpayers engaging in business can and may well suffer losses in some years.

Plaintiff points out that the portion of the social security tax imposed by § 3101 on wages received by resident employees, and paid by the employee, is an income tax on gross income. See *Helvering v. Davis,* 301 U.S. 619, 635 (1937); *Cain v. United States,* 211 F.2d 375, 377 (C.A. 5, 1954) *cert. denied,* 347 US 1013.[18] Again, it seems clear

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[17]The Revenue Service has ruled that the foreign tax credit is permissible for foreign taxes on comparable gross income of United States citizens derived from foreign sources. Rev. Rul. 66–65, 1966–1 Cum. Bull. 175; I.T. 4013, 1950–1 Cum. Bull. 65.

[18]The Service has held that taxes paid under a foreign counterpart of § 3101 are creditable. Rev. Rul. 69-338, 1969—1 Cum. Bull. 194. See also note 9, *supra.*

that the legislative assumption was that it would be rare for an employee to spend so much of his own money in producing his wages that all net gain would be eliminated.[19]

This review of the pertinent judicial decisions and Internal Revenue Service rulings, as well as of comparable gross income levies in the federal income tax system, persuades us that the term "income tax" in § 901(b)(1) covers all foreign income taxes designed to fall on some net gain or profit, and includes a gross income tax if, but only if, that impost is almost sure, or very likely, to reach some net gain because costs or expenses will not be so high as to offset the net profit.[20] *Cf.* Owens, *The Foreign Tax Credit* (1961) 52–4.

We see nothing in the comment in the Senate report on the 1942 amendment adding the "in lieu" provision (now in § 903) to the foreign tax credit[21] basically at odds

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[19]Defendant wrongly characterizes an employee's expenses as insubstantial; as plaintiff points out, millions of wage-earners pay union dues which are not insubstantial expenses. Nevertheless, it is almost unknown, or at best extremely rare, for an employee's deductible expenses to eat up all his wages or salary.

[20]Defendant's presentation has oscillated between the points that no gross income tax is creditable and that such a levy can be credited if the taxpayer's costs and expenses are insubstantial, insignificant, or *de minimis*. As already indicated, we reject both formulations as too extreme, though we accept the Government's core notion that the foreign tax must be designed so as to reach some net gain.

[21]S. Rep. No. 1631, 77th Cong., 2d Sess., p. 131, 1942–2 Cum. Bull. 504, 602, said in pertinent part:

"In the interpretation of the term 'income tax,' the Commissioner, the Board, and the courts have consistently adhered to a concept of income tax rather closely related to our own, and if such foreign tax was not imposed upon a basis corresponding approximately to net income it was not recognized as a basis for such credit. Thus if a foreign country in imposing income taxation

with this interpretation, and something to support it. The report does flatly repudiate plaintiff's notion that all foreign gross income taxes were and are creditable. But the committee's reference to "gross income" taxes as barred by § 901, as then construed, must be taken together with the reference to foreign taxes "imposed upon a basis corresponding *approximately* to net income" (emphasis added). We believe the authors of the report did not mean to blanket within their exclusion of gross income tolls those gross income taxes expected to fall in the end upon net gain and thus to approximate a net income levy.[22]

IV.

Do the three foreign taxes we are now discussing (Thailand Business Tax, Type 1 and Type 2; Philippines Tax on Banks; Buenos Aires Tax on Profit-Making Activities) meet this test? Their coverage is summarized at the outset of Part II, *supra,* and there is little difficulty in concluding that they do not.

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authorized, for reasons growing out of the administrative difficulties of determining net income or taxable basis within that country, a United States domestic corporation doing business in such country to pay a tax * * * measured, for example, by gross income, gross sales or a number of units produced within the country, such tax has not heretofore been recognized as a basis for a credit. Your committee has deemed it desirable to extend the scope of * * * [§ 901 by adding § 903]."

[22]Coming after the original enactment of the predecessor of § 901(b)(1), and purporting merely to describe the then practice under an interpretation of that provision, the 1942 report does not, in any event, have the same standing as legislative history antedating passage of the statute being interpreted. *Cf. Rainwater v. United States,* 356 U.S. 590, 593 (1958); *Fogarty v. United States,* 340 U.S. 8, 13–14 (1950).

Each of the taxes is levied on gross income from the banking business and allows no deductions for the costs or expenses of producing the income. Any taxpayer could be liable whether or not it operated at a profit during the year. The only question is whether it is very unlikely or highly improbable that taxpayers subject to the impost would make no profit or would suffer a loss. Plaintiff has presented no proof to this effect and does not very strongly urge that proposition. Obviously, it and the other institutions subject to the taxes had substantial costs in their banking business, salaries and rent being the major items. The covered banks must also have had bad debts and defaults, and these would have to be taken into account in calculating annual net gain.

The three taxes were each imposed on banks generally, not merely on the successful ones. Banks do suffer losses in certain years, especially newly established banks, and some have even been known to fail. There is no reason to believe that banks in Thailand, the Philippines, and Argentina are any different. Nor can one say on this record that the three governments felt that net gain would always (or nearly so) be reached by these special banking levies, or that they designed these particular taxes to nip such net profit. Each of the three jurisdictions had a general net income tax (comparable to ours, and admittedly creditable) which the Bank of America and other banks had to pay. That was the impost intended to reach net gain.

We cannot say, therefore, that there was only a minimal risk that the combination of a bank's expenses plus its bad debt experience (and other losses) would out-

balance its net gain or profits in any particular year—or that the foreign countries so considered. On the contrary, as with the insurance company in *Allstate:* "Plaintiff may have had a gain or it may have had a loss in operating its insurance [banking] business during the year in question, but this would not affect the premiums [banking] tax it had to pay." 190 Ct. Cl. at 28, 419 F.2d at 414.

The result is that the plaintiff is not entitled to recover (except for the inadvertent disallowance by the Service of a small credit for 1959, see finding 18) and its petition must be dismissed (except for that slight error).

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Roald A. Hogenson, and the briefs and arguments of counsel, makes findings of fact as follow:

1. Plaintiff, Bank of America National Trust and Savings Association, was at all times stated herein and now is a national banking association duly organized and existing under the laws of the United States, with its principal office at San Francisco, California.

2. For each of the taxable years in issue (1959, 1960, and 1961), as well as for taxable year 1958, plaintiff timely filed its federal income tax return prepared under the accrual method of accounting and on a calendar year basis.

3. At all times during 1959, 1960, and 1961, plaintiff conducted from its branch in Bangkok, Thailand, a general banking business including, but not limited to, the

making of commercial, real estate and personal installment loans, the rendering of trust department and property management services, foreign exchange transactions, the issuance of letters of credit, guarantees, travelers checks and cashiers' checks, and acceptance of trade paper.

At all times during 1958[1] through 1961, plaintiff conducted a like business from its branch in Manila, Republic of the Philippines.

At all times during 1961, plaintiff conducted a like business from its branch in Buenos Aires, Argentina.

4. Plaintiff accrued and paid to the Kingdom of Thailand for 1959, 1960, and 1961 taxes imposed on its Bangkok branch operations by the Revenue Code and laws of Thailand as follows:[2]

[1]The year 1958 is involved only because of a Philippines tax credit carry-over from that year to 1959.

[2]All taxes paid to foreign countries as described herein were imposed on and paid by plaintiff in foreign currencies. Since the conversion rates between the foreign currencies and U.S. dollars are not in dispute, the amounts of the foreign taxes will, for convenience, be stated solely in U.S. dollars.

1959

Revenue Code, Section 65, Division 3, Chapter IV, Title II (hereinafter referred to as Companies Income Tax)	$117,041.59
Revenue Code, Section 70 bis (hereinafter referred to as Profit Remittance Tax)	29,495.62
Revenue Code, Section 78, Division 1, Chapter IV, Category 12 of Business Tax Schedule (hereinafter referred to as Business Tax):	
Type 1	17,574.78
Type 2	14,494.28
Profit Remittance Tax	676.18
Thailand Municipal Tax	3,206.91
Receipts Tax	366.44
	$182,855.80

1960

Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
Business Tax:	
Type 1	22,604.89
Type 2	10,078.48
Thailand Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$249,734.35

1961

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
Business Tax:	
Type 1	21,246.55
Type 2	21,196.38
Thailand Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$275,345.10

5. For each of the years 1959, 1960, and 1961, the Companies Income Tax was the generally imposed income tax on all corporations operating in the Kingdom of Thailand. The Business Tax, Type 1 and Type 2, Municipal Tax and Receipts Tax were all taxes imposed separate and apart from, and in addition to, the Companies Income Tax. Plaintiff was not exempt from payment of the Companies Income Tax for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Companies Income Tax deductions under section 65 bis of the Thailand Revenue Code for the amount of the Business Tax, Type 1 and Type 2, Municipal Tax and Receipts Tax which it paid.

6. The Thailand Business Tax provisions in effect in the taxable years in issue are set forth in Chapter IV of Title II of The Revenue Code of Thailand compiled and translated by the Translation and Secretarial Office of the Kingdom of Thailand. A copy of the portions of such overall translation deemed relevant by the parties is Ex-

hibit 8 attached to the stipulation of the parties filed herein.

Section 77 of the Business Tax provisions defines "business" as meaning "engaging in business, trade, industry, agriculture, production, importing, exporting or in the rendering of services for gain." Persons engaged in business are defined as natural persons, juristic persons and bodies of persons as prescribed in the Business Tax Rate Schedule engaged in the categories of business prescribed therein.

Section 78 provides in pertinent part as follows:

> Persons engaged in business, as listed in the Business Tax Rate Schedule annexed to this chapter, have the duty to pay business tax on the gross takings for each tax month at the rates given in the said Schedule of Business Tax Rate Schedule.

Section 79 defines "gross takings" in pertinent part as follows:

> Gross taking means money, property, consideration or any benefit of value received or receivable whether within or outside the Kingdom in connection with engaging in business, * * *
>
> * * * * * *
>
> (3) gross takings from the business of banking, that is to say
>
> (a) interest, discounts, fees or service charges, and
>
> (b) profit, before the deduction of any expense, from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances;

The Business Tax Rate Schedule has four columns: (1) Category of Business, (2) Particular Business, (3) Person Engaged in Business under a Duty to Pay Business Tax, and (4) Rate of Tax as Percentage of Gross Takings.

Item 12 of the Category of Business column is "Banking," described in the Particular Business column as follows:

> Savings banking other than that of the government, commercial banking under the law on commercial banking or the business of those who regularly do business similar to that of a commercial bank such as lending money, giving guaranties, currency exchange, issuance, purchase or sale of notes, foreign remittance by various means including "poi kuan" or "huay tua".
>
> Type 1 Interest, discounts, fees or service charges.
>
> Type 2 Profit before the deduction of any expenditure from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

As to Type 1 of the Business Tax on banking, the designated rate of tax is 2.5 percent of gross takings, and as to Type 2, 10.5 percent of gross takings.

7. Plaintiff accrued and paid to the Republic of the Philippines for the years 1958 through 1961 taxes imposed on its Manila branch operations by the National Internal Revenue Code and laws of the Philippines as follows:

1958	
National Internal Revenue Code, Section 24(b), Chapter III, Title II (hereinafter referred to as Tax on Foreign Corporations)	$369,126.56
National Internal Revenue Code, Section 249, Title VIII (hereinafter referred to as Tax on Banks)	122,932.74
Section 2 of Commonwealth Act No. 465 (hereinafter referred to as Residence Tax)	845.61
	$492,904.91
1959	
Tax on Foreign Corporations	$439,031.32
Tax on Banks	132.396.26
Residence Tax	981.06
	$572,408.64
1960	
Tax on Foreign Corporations	$259,540.67
Tax on Banks	84,595.15
Residence Tax	656.67
	$344.792.49
1961	
Tax on Foreign Corporations	$328,863.00
Tax on Banks	105,451.52
Residence Tax	656.67
	$434,971.19

8. For each of the years 1959, 1960, and 1961, the Tax on Foreign Corporations was the generally imposed in-

come tax of the Republic of the Philippines on all foreign corporations doing business there. The Tax on Banks was a tax imposed separate and apart from, and in addition to, the Tax on Foreign Corporations. Plaintiff was not exempt from payment of the Tax on Foreign Corporations for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Tax on Foreign Corporations a deduction under section 30(c) of the Philippines National Revenue Code for the amount of the Tax on Banks which it paid.

9. The National Internal Revenue Code and the laws of the Philippines in effect throughout the taxable years in issue and only insofar as relevant herein, provide as follows:

> SEC. 29. *Gross income.*—(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, individuals, securities, or the transactions of any business carried on for gain or profit, or gains, profits, and income derived from any source whatever.
>
> • • • • •
>
> SEC. 249. *Tax on banks.*—There shall be collected a tax of five *per centum* on the gross receipts derived by all banks doing business in the Philippines from interests, discounts, dividends, commissions, profits from exchange, royalties, rentals of property, real

and personal, and all other items treated as gross income under section twenty-nine of this Code.

* * * * *

10. The Philippines Tax on Banks (Section 249 above) was enacted in its present form on October 1, 1946, by section 3 of Rep. Act. No. 39. Each bill presented to the Philippines Congress is accompanied by an "Explanatory Note" which is prepared by the Congressman or Senator who introduces the bill and is intended to explain the purpose of the proposed legislation. The Explanatory Note for H.B. No. 730, which became Rep. Act No. 39, provided, insofar as it is relevant herein, that:

> Section 3 of the bill amends section 249 of the Tax Code by repealing the present taxes on deposits, circulation, and capital of banks, and by imposing, in lieu thereof, a tax of 5% on the gross income of these institutions. The present taxes now imposed on banks are antiquated and have no direct relation to their earnings or to their ability to pay. The tax on deposits has a tendency to discourage persons from depositing their savings in banks. A tax of 5% on the gross income of banks is considered fair and reasonable, in view of the fact that the total taxes on capital, deposits and circulation now being paid by some banks amount to about 4% of their gross income. * * *

11. Plaintiff accrued and paid to the Republic of Argentina and to the City of Buenos Aires for 1961 taxes imposed on its Buenos Aires branch operations under the income tax laws of Argentina and the City of Buenos Aires as follows:

Corporation Income Tax (Law No. 11,682)	$226,196.26
Tax in Substitution of Surcharge on Free Transfer of Property (Law No. 14,060, Integrated Text of 1960)	3,982.49
City of Buenos Aires Tax on Profit-Making Activities (Decree-Law No. 141/59)	7,242.86
Contribution to the Bankers' Institute for Social Services (Decree-Law No. 20.714 /56)	28,756.36
	$266,177.97

12. For the year 1961, the Corporation Income Tax was the generally imposed income tax payable by the corporations doing business in Argentina. The Tax in Substitution of Surcharge on Free Transfer of Property, the City of Buenos Aires Tax on Profit-Making Activities and the Contribution to the Bankers' Institute for Social Services were taxes imposed separate and apart from, and in addition to, the Corporation Income Tax. Plaintiff was not exempt from payment of the Corporation Income Tax for 1961. However, it claimed and was allowed in computing its net or taxable income subject to the Corporation Income Tax deductions for the amounts of the above-mentioned taxes which it paid. The deduction for the Tax in Substitution of Surcharge on Free Transfer of Property was pursuant to Article 10, Section I, of the Argentina Substitute Inheritance Tax. The deduction for the City of Buenos Aires Tax on Profit-Making Activities was pursuant to Article 62(b) of the Corporation Income Tax. The deduction for the Contribution to the

Bankers' Institute for Social Services was pursuant to Article 62(h) of the Corporation Income Tax.

13. The City of Buenos Aires Tax on Profit-Making Activities in effect throughout 1961 provides in pertinent parts as follows:

Art. 115

* * * * * *

In the case of banks, insurance, savings and loan and security and investment companies, the tax levied shall be computed on the basis of gross receipts obtained during the business year which ended during the first preceding calendar year.

Art. 121

In the case of banks and other lending institutions which are governed by banking legislation and its supplementary provisions, the taxable amount shall be composed of interest, discounts, profits from non-exempt taxable securities and other revenue, resulting from profits and remuneration for services received in the course of the last business year.

The Argentina Tax in Substitution of Surcharge on Free Transfer of Property, in effect in 1961, imposed a corporate tax in the amount of 1 percent of plaintiff's capital and reserves. Capital reserves are defined as being the difference between the total assets and the total liabilities at the end of each financial period of the corporation, with modifications for dividend distributions, valuation of assets, and exclusions for various assets and liabilities.

The Argentina Contribution to the Bankers' Institute for Social Services, in effect throughout 1961, is a tax collected to support functions of the Bankers' Institute as an

instrumentality of government administering a social security program within the banking industry. The Bankers' Institute provides social services, such as medical coverage, rest and recuperation facilities, commissaries, and other pecuniary benefits for employees of certain private banking institutions. One principal source of funds for the Bankers' Institute is compulsory monthly contributions by the active employee, retirees and pensioners of private banking institutions in an amount of 2 percent of their total monthly salaries. A second source is compulsory contribution by the employer of funds to match the contributions of its active employees, withheld from the salaries of the employees. By amendment effective March 7, 1957, privately owned banks were also required to pay additional employer contributions equal to 2 percent of the total amounts received by them in respect of interest and commissions.

14. In each of its federal income tax returns filed respectively for taxable years 1958, 1959, and 1960, plaintiff deducted under section 164 accrued taxes payable by it to such foreign countries for that taxable year.

In its federal income tax return filed for taxable year 1961, and on the appropriate form attached thereto, plaintiff claimed foreign tax credit under section 901 in the amount of $3,405,098.17 for accrued taxes payable by it to such foreign countries for 1961. It calculated the limitation on such credit under the per country limitation provided by section 904(a)(1), as effective in 1961.

15. On January 17, 1962, plaintiff timely filed with the District Director a claim for refund of federal income tax allegedly overpaid by it for 1958. In its claim for refund,

plaintiff timely elected to take a credit under section 901, rather than a deduction under section 164, for taxes accrued for 1958 which plaintiff paid to foreign countries. Plaintiff attached to its claim the appropriate form which, among other things, reflected the accrual for 1958 and payment of Philippines taxes of $492,904.91, and claimed a credit of $259,687.46 under section 901 for such Philippines taxes after application of the limitation provided by section 904(a), as effective in 1958.

16. The District Director allowed in full plaintiff's claim for refund for 1958 to the extent it related to credit for Philippines taxes. On or about August 5, 1964, the District Director paid to plaintiff a refund, including therein the full $259,687.46 claimed with respect to such taxes.

17. On April 10, 1963, plaintiff timely filed with the District Director separate claims for refund of federal income tax allegedly overpaid by it for 1959 and 1960.

18. (a) Following an examination by the Internal Revenue Service (hereinafter referred to as the Service) of plaintiff's books and records with respect to its federal income tax returns, federal income tax liabilities and claims for refund for the years 1959 and 1960, plaintiff received from the District Director a copy of a Revenue Agent's report, dated March 26, 1964, allowing the following Thailand taxes as creditable for 1959 and 1960:

1959	
Companies Income Tax	$117,041.59
Profit Remittance Tax	29,495.62
	$146,537.21

1960	
Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
	$211,445.94

The following Thailand taxes were disallowed as non-creditable for those years:

1959	
Business Tax:	
Type 1	$17,574.78
Type 2	14,494.28
Municipal Tax	3,206.91
Profit Remittance Tax[4]	676.18
Receipts Tax	366.44
	$36,318.59

1960	
Business Tax:	
Type 1	$22,604.89
Type 2	10,078.48
Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$38,288.41

[4]It has been stipulated between the parties that the disallowance for credit of $676.18 of Thailand Profit Remittance Tax paid by plaintiff for 1959 was an inadvertent error by the Revenue Agent. There is no dispute that that amount is an income tax for the purpose of section 901 and is, therefore, allowable as a foreign tax credit.

The $36,318.59 and $38,288.41 of Thailand taxes disallowed as noncreditable for 1959 and 1960, respectively, were allowed as deductions under section 164.

(b) That report also allowed in full plaintiff's claim to a carry-over of $233,217.45 in Philippines tax credit from 1958 to 1959. It allowed the Philippines Tax on Foreign Corporations in the amount of $439,031.32 as creditable for 1959, but disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$132,396.26
Residence Tax[5]	981.06
	$133,377.32

The noncreditable Philippines taxes were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1959 was thereby reduced by $133,377.32, and its Philippines tax credit for 1959 was reduced to $616,210.08 after application of the limitation under section 904(a), as effective in 1959.

(c) That report allowed plaintiff a carry-over from 1959 to 1960 of Philippines tax credit of $56,038.69, rather than the $122,407.27 which plaintiff had claimed in its 1960 claim for refund. It also allowed the Philippines Tax on Foreign Corporations in the amount of $259,540.67 as creditable for 1960, but disallowed the following Philippines taxes as non-creditable for that year:

[5]It has been stipulated between the parties that the Philippines Residence Tax in the amounts of $981.06, $656.67, and $656.67 paid for 1959, 1960, and 1961, respectively, was not available for credit, but was properly allowed as a deduction.

Tax on Banks	$84,595.15
Residence Tax[6]	656.67
	$85,251.82

The noncreditable Philippines taxes paid for 1960 were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1960 was thereby reduced by $85,251.82, and its Philippines tax credit was reduced to $315,579.36 after application of the limitation under section 904(a), as effective in 1960.

19. On April 29, 1964, plaintiff timely filed with the District Director a written election by which it elected to have its foreign tax credit for 1961 calculated on the basis of the overall limitation provided by section 904(a)(2), as effective in 1961. Plaintiff attached to its election the appropriate amended form which claimed foreign tax credits for 1961 totalling $3,511,311.43. The form reflected, among other things, the accrual and payment of (1) Thailand taxes of $275,345.10, (2) Philippines taxes of $434,971.19, and (3) Argentina taxes of $266,177.97, and claimed a credit under section 901 for those taxes after application of the overall limitation provided by section 904(a)(2), as effective in 1961.

20. (a) Following an examination by the Service of plaintiff's books and records with respect to its federal income tax return and federal income tax liability for 1961, plaintiff received from the District Director a copy of a Revenue Agent's report, dated May 5, 1964. That report gave effect to plaintiff's election of the overall lim-

[6] *See* n. 5, *supra.*

itation on the foreign tax credit and allowed the following Thailand taxes as creditable for 1961:

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
	$227,059.49

It disallowed the following Thailand taxes as noncreditable for that year:

Business Tax:	
Type 1	$21,246.55
Type 2	21,196.38
Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$48,285.61

The $48,285.61 of Thailand taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.

(b) That report allowed the Philippines Tax on Foreign Corporations in the amount of $328,863 as creditable for 1961. It disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$105,451.52
Residence Tax[7]	656.67
	$106,108.19

[7] *See* n. 5, *supra.*

The $106,108.19 of Philippines taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.[8]

(c) That report allowed the following Argentina taxes as creditable for 1961:

Corporation Income Tax	$169,747.87
Excess Profits Tax	56,448.30
	$226,196.17

It disallowed the following Argentina taxes as noncreditable for that year:

Tax in Substitution of Surcharge on Free Transfer of Property	$3,982.49
City of Buenos Aires Tax on Profit-Making Activities	7,242.86
Contribution to Bankers' Institute for Social Services	28,756.36
	$39,981.71

The $39,981.71 of Argentina taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.

21. Plaintiff duly filed a written protest of certain of the adjustments proposed in the Revenue Agents' reports dated March 26 and May 5, 1964, including the adjust-

[8]It has been stipulated between the parties that the allowance of Philippines taxes in the amount of $106,108.19 as deductions rather than credits for 1961, thereby reducing plaintiff's taxable income from Philippines sources, had no effect on the limitation on plaintiff's foreign tax credit under section 904 because of the election by plaintiff with respect to 1961 of the overall limitation pursuant to section 904(a)(2).

ments relating to Thailand and Philippines taxes paid for 1959 and 1960, and to Thailand, Philippines, and Argentina taxes paid for 1961. On January 3, 1966, plaintiff received from defendant an Appellate Division audit statement revising certain of the adjustments proposed in those reports. However, no change was made in the adjustments relating to Thailand taxes for 1959, 1960, and 1961, to Philippines taxes for 1960 and 1961, or to Argentina taxes for 1961. The audit statement did change the Philippines tax adjustment relating to 1959 by increasing the section 904 limitation by $12.71 to a total for 1959 of $616,222.79. That statement determined net over-assessments of $1,333,070.97 and $1,329,063.21 for 1959 and 1960, respectively, and a net deficiency of $188,967.82 for 1961.

22. On or about March 16, 1966, plaintiff executed and delivered to the Internal Revenue Service Form 870–AD, covering the taxable years 1959, 1960, and 1961, in which the following qualification was stated:

> Taxpayer agrees to the settlement of all issues except that the taxpayer reserves the right to file claims or prosecute an action for the recovery of the deficiency or reduced overassessments applicable to foreign taxes disallowed as foreign tax credits under section 901(b) of the 1954 Code.
>
> Taxpayer's agreement on the reverse side that no claim for refund or credit shall be filed or prosecuted is hereby made expressly subject to taxpayer's reserved right as expressed in the preceding paragraph.

The Commissioner of Internal Revenue by his duly authorized representative, C. E. Robinson, Chief of the Ap-

pellate Branch Office in San Francisco, executed the Form 870–AD thereby accepting plaintiff's offer to accept the proposed overassessments for 1959 and 1960 and the proposed deficiency for 1961, subject to plaintiff's express reservation contained therein. Plaintiff is not barred by the terms of the Form 870–AD from prosecuting subject claims for relief.

23. On July 13, 1966, the District Director, pursuant to the Form 870–AD, scheduled a refund to plaintiff of federal income tax for 1959 of $1,333,070.97, together with interest thereon of $436,892.06, and for 1960 of $1,329,-063.21, together with interest thereon of $404,836.29. The 1961 deficiency in the amount of $188,967.82 was credited against the amount of the refund and the balance of the refund duly paid to plaintiff.

24. Plaintiff's respective claims for refund for 1959 and for 1960 were each allowed in part, but to the extent to which each pertained to credit for the Thailand and Philippines taxes determined to be noncreditable in the Revenue Agent's report of March 26, 1964, each claim was disallowed by the Commissioner of Internal Revenue acting by and through the District Director by a certified letter, mailed to plaintiff, the one for 1959 on June 21, 1966, and the other for 1960 on July 26, 1966.

25. On July 9, 1968, plaintiff timely filed with the District Director its claim for refund, Form 843, of federal income taxes overpaid by it for 1961.

26. Plaintiff's petition in Docket No. 184–68, covering taxable years 1959 and 1960, was filed June 19, 1968, within 2 years after the denial of plaintiff's claims for refund for those years.

More than 6 months had elapsed after the filing of plaintiff's claim for refund for taxable year 1961 before plaintiff's petition was filed in Docket No. 138–69 on March 7, 1969, covering that year.

27. No action is now pending or has ever been taken on plaintiff's claims as described herein by Congress or by any department of defendant or in any judicial proceeding other than as described herein. Plaintiff is now and has always been the sole owner of the claims alleged herein and has made no transfer or assignment of those claims or any part thereof or any interest therein. No part of those claims has been refunded, repaid or credited to plaintiff.

28. Plaintiff has not shown that, with respect to banking business in Thailand, the Philippines, and Argentina, it was very probable or highly likely that plaintiff or other similar institutions would always make a net gain or profit, rather than suffer a loss.

CONCLUSION OF LAW

Upon the foregoing findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover only with respect to the $676.18 of the Thailand Profit Remittance Tax paid and accrued for 1959 which was disallowed as a foreign tax credit, and is not entitled to recover as to the other claimed foreign tax credits. As to the latter claims the petition is dismissed. Judgment is entered accordingly, and the precise amount of recovery will be determined under Rule 131(c).

Appendix B

IN THE

United States Court of Claims

Nos. 184–68 and 138–69

(Filed May 24, 1971)

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

Harry R. Horrow, attorney of record, for plaintiff. *Stephen J. Martin* and *David L. Klott*, of counsel.

Michael H. Singer, with whom was *Assistant Attorney General Johnnie M. Walters*, for defendant. *Philip R. Miller*, of counsel.

OPINION

HOGENSON, *Commissioner:* Plaintiff, Bank of America National Trust and Savings Association, seeks judgment in these consolidated cases for refund of federal income tax for its taxable years 1959, 1960, and 1961, alleging as erroneous the determination of the Internal Revenue Service that certain foreign taxes paid by plaintiff for such taxable years were not income taxes within the

*The opinion, findings of fact, and recommended conclusions of law are submitted under the order of reference and Rule 134(h).

meaning of section 901(b)(1) of the Internal Revenue Code of 1954, and hence not to be treated as foreign tax credits against plaintiff's federal income tax liability pursuant to section 901(a).[1]

It is my opinion that such determination was erroneous to the extent hereinafter detailed, and that plaintiff is entitled to recover, with the amounts of recovery to be determined in further proceedings.

Docket No. 184–68 covers taxable years 1959 and 1960, with Docket No. 138–69 concerning taxable year 1961. For all 3 years, plaintiff paid taxes to the Kingdom of Thailand and to the Republic of the Philippines, and also to the Philippines for 1958. For 1961, plaintiff also paid taxes to the Republic of Argentina.

Plaintiff is and was a national banking association organized and existing under the laws of the United States, with its principal office at San Francisco, California.

For each of the taxable years in issue, as well as for taxable year 1958,[2] plaintiff timely filed its federal income tax return prepared under the accrual method of accounting and on a calendar year basis, and paid the amount of tax liability as computed thereon.

In each of the foreign countries involved, and at all times relevant as to each country, plaintiff conducted a general banking business from a branch office. These were located respectively at Bangkok, Thailand; Manila in the

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[1]All section references are to the Internal Revenue Code of 1954 and the regulations thereunder, unless otherwise indicated.

[2]Taxable year 1958 is involved only because of a Philippines tax credit carry-over from that year to 1959.

Philippines; and Buenos Aires, Argentina. In each country, such business included, but was not limited to, the making of commercial, real estate and personal installment loans, the rendering of trust department and property management services, foreign exchange transactions, the issuance of letters of credit, guarantees, travelers checks and cashiers' checks, and acceptance of trade paper.

Plaintiff accrued and paid to the Kingdom of Thailand for 1959, 1960, and 1961 taxes imposed on its Bangkok branch operations by the Revenue Code and laws of Thailand as follows:[3]

1959

Revenue Code, Section 65, Division 3, Chapter IV, Title II (hereinafter referred to as Companies Income Tax)	$117,041.59
Revenue Code, Section 70 bis (hereinafter referred to as Profit Remittance Tax)	29,495.62
Revenue Code, Section 78, Division 1, Chapter IV, Category 12 of Business Tax Schedule (hereinafter referred to as Business Tax):	
Type 1	17,574.78
Type 2	14,494.28
Profit Remittance Tax	676.18
Municipal Tax	3,206.91
Receipts Tax	366.44
	$182,855.80

[3]All taxes paid to foreign countries as described herein were imposed on and paid by plaintiff in foreign currencies. Since the conversion rates between the foreign currencies and U.S. dollars are not in dispute, the amounts of the foreign taxes will, for convenience, be stated solely in U.S. dollars.

1960

Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
Business Tax:	
Type 1	22,604.89
Type 2	10,078.48
Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$249,734.35

1961

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
Business Tax:	
Type 1	21,246.55
Type 2	21,196.38
Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$275,345.10

For each of those years, the Companies Income Tax was the generally imposed income tax on all corporations operating in the Kingdom of Thailand. The Business Tax, Type 1 and Type 2, the Municipal Tax and the Receipts Tax were all taxes imposed separate and apart from, and in addition to, the Companies Income Tax. Plaintiff was not exempt from payment of the Companies Income Tax for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Companies Income Tax deductions for the amounts of the Business Tax, Type 1

and Type 2, Municipal Tax and Receipts Tax which it paid.

Plaintiff accrued and paid to the Republic of the Philippines for the years 1958 through 1961 taxes imposed on its Manila branch operations by the National Internal Revenue Code and laws of the Philippines as follows:

1958	
National Internal Revenue Code, Section 24(b), Chapter III, Title II (hereinafter referred to as Tax on foreign Corporations)	$369,126.56
National Internal Revenue Code, Section 249, Title VIII (hereinafter referred to as Tax on Banks)	122,932.74
Section 2 of Commonwealth Act No. 465 (hereinafter referred to as Residence Tax)	845.61
	$492,904.91
1959	
Tax on Foreign Corporations	$439,031.32
Tax on Banks	132,396.26
Residence Tax	981.06
	$572,408.64
1960	
Tax on Foreign Corporations	$259,540.67
Tax on Banks	84,595.15
Residence Tax	656.67
	$344,792.49

1961

Tax on Foreign Corporations	$328,863.00
Tax on Banks	105,451.52
Residence Tax	656.67
	$434,971.19

For each of the years 1959, 1960, and 1961, the Tax on Foreign Corporations was the generally imposed income tax of the Republic of the Philippines on all foreign corporations doing business there. The Tax on Banks was a tax imposed separate and apart from, and in addition to, the Tax on Foreign Corporations. Plaintiff was not exempt from payment of the Tax on Foreign Corporations for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Tax on Foreign Corporations a deduction for the amount of the Tax on Banks which it paid.

Plaintiff accrued and paid to the Republic of Argentina and to the City of Buenos Aires for 1961 taxes imposed on its Buenos Aires branch operations under the income tax laws of Argentina and the City of Buenos Aires as follows:

Corporation Income Tax (Law No. 11,-682)	$226,196.26
Tax in Substitution of Surcharge on Free Transfer of Property (Law No. 14,060, Integrated Text of 1960)	3,982.49
City of Buenos Aires Tax on Profit-Making Activities (Decree-Law No. 141/59)	7,242.86
Contribution to the Bankers' Institute for Social Services (Decree-Law No. 20.-714/56)	28,756.36
	$266,177.97

For that year, the Corporation Income Tax was the generally imposed income tax payable by corporations doing business in Argentina. The Tax in Substitution of Surcharge on Free Transfer of Property, the City of Buenos Aires Tax on Profit-Making Activities and the Contribution to the Bankers' Institute for Social Services were taxes imposed separate and apart from, and in addition to, the Corporation Income Tax. Plaintiff was not exempt from payment of the Corporation Income Tax for 1961. However, it claimed and was allowed in computing its net or taxable income subject to the Corporation Income Tax deductions for the amounts of the other above-mentioned taxes which it paid.

In each of its federal income tax returns filed respectively for taxable years 1958, 1959, and 1960, plaintiff deducted under section 164 accrued taxes payable by it to such foreign countries for that taxable year.

In its federal income tax return filed for taxable year 1961, and on the appropriate form attached thereto, plaintiff claimed foreign tax credit under section 901 in the amount of $3.405,098.17 for accrued taxes payable by it to such foreign countries for 1961. It calculated the limitation on such credit under the per country limitation provided by section 904(a)(1), as effective in 1961.

On January 17, 1962, plaintiff timely filed with the District Director a claim for refund of federal income tax allegedly overpaid by it for 1958. In its claim for refund, plaintiff timely elected to take a credit under section 901, rather than a deduction under section 164, for taxes accrued for 1958 which it paid to foreign countries. Plaintiff attached to its claim the appropriate

form which, among other things, reflected the accrual for 1958 and payment of Philippines taxes of $492,904.91 and claimed a credit of $259,687.46 under section 901 for such Philippines taxes after application of the limitation provided by section 904(a), as effective in 1958.

The District Director allowed in full plaintiff's claim for refund for 1958 to the extent it related to credit for Philippines taxes. On or about August 5, 1964, the District Director paid to plaintiff a refund, including therein the full $259,687.46 claimed with respect to such taxes.

On April 10, 1963, plaintiff timely filed with the District Director separate claims for refund of federal income tax allegedly overpaid by it for 1959 and 1960.

Following an examination by the Internal Revenue Service (hereinafter referred to as the Service) of plaintiff's books and records with respect to its federal income tax returns, federal income tax liabilities and claims for refund for the years 1959 and 1960, plaintiff received from the District Director a copy of a Revenue Agent's report, dated March 26, 1964, allowing the following Thailand taxes as creditable for 1959 and 1960:

1959	
Companies Income Tax	$117,041.59
Profit Remittance Tax	29,495.62
	$146,537.21
1960	
Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
	$211,445.94

The following Thailand taxes were disallowed as noncreditable for those years:

1959	
Business Tax:	
Type 1	$17,574.78
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Municipal Tax	3,206.91
Profit Remittance Tax[4]	676.18
Receipts Tax	366.44
	$36,318.59
1960	
Business Tax:	
Type 1	$22,604.89
Type 2	10,078.48
Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$38,288.41

The $36,318.59 and $38,288.41 of Thailand taxes disallowed as noncreditable for 1959 and 1960 respectively, were allowed as deductions under section 164.

That report also allowed in full plaintiff's claim to a carryover of $233,217.45 in Philippines tax credit from 1958 to 1959. It allowed the Philippines Tax on Foreign Corporations in the amount of $439,031.32 as creditable

[4]It has been stipulated between the parties that the disallowance for credit of $676.18 of Thailand Profit Remittance Tax paid by plaintiff for 1959 was an inadvertent error by the Revenue Agent. There is no dispute that that amount is an income tax for the purpose of section 901 and is, therefore, allowable as a foreign tax credit.

for 1959, but disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$132,396.26
Residence Tax[5]	981.06
	$133,377.32

The noncreditable Philippines taxes were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1959 was thereby reduced by $133,377.32, and its Philippines tax credit for 1959 was reduced to $616,210.08 after application of the limitation under section 904(a), as effective in 1959. The report allowed plaintiff a carry-over from 1959 to 1960 of Philippines tax credit of $56,038.69, rather than the $122,407.27 which plaintiff had claimed in its 1960 claim for refund.

The Philippines Tax on Foreign Corporations in the amount of $259,540.67 was allowed as creditable for 1960, but the following Philippines taxes were disallowed as noncreditable for that year:

Tax on Banks	$84,595.15
Residence Tax[6]	656.67
	$85,251.82

The noncreditable Philippines taxes paid for 1960 were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1960 was

[5]It has been stipulated between the parties that the Philippines Residence Tax in the amounts of $981.06, $656.67, and $656.67 paid for 1959, 1960 and 1961, respectively, was not available for credit, but was properly allowed as a deduction.

[6]*See* n. 5, *supra.*

thereby reduced by $85,251.82, and its Philippines tax credit was reduced to $315,579.36 after application of the limitation under section 904(a), as effective in 1960.

On April 29, 1964, plaintiff timely filed with the District Director a written election by which it elected to have its foreign tax credit for 1961 calculated on the basis of the overall limitation provided by section 904(a)(2), as effective in 1961. Plaintiff attached to its election the appropriate amended form which claimed foreign tax credits for 1961 totaling $3,511,311.43. The form reflected, among other things, the accrual and payment of (1) Thailand taxes of $275,345.10, (2) Philippines taxes of $434,971.19, and (3) Argentina taxes of $266,177.97, and claimed a credit under section 901 for those taxes after application of the overall limitation provided by section 904(a)(2), as effective in 1961.

Following an examination by the Service of plaintiff's books and records with respect to its federal income tax return and federal income tax liability for 1961, plaintiff received from the District Director a copy of a Revenue Agent's report, dated May 5, 1964. That report gave effect to plaintiff's election of the overall limitation on the foreign tax credit and allowed the following Thailand taxes as creditable for 1961:

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
	$227,059.49

It disallowed the following Thailand taxes as noncreditable for that year:

Business Tax:	
Type 1	$21,246.55
Type 2	21,196.38
Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$48,285.61

The $48,285.61 of Thailand taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.

That report allowed the Philippines Tax on Foreign Corporations in the amount of $328,863 as creditable for 1961. It disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$105,451.52
Residence Tax[7]	656.67
	$106,108.19

The $106,108.19 of Philippines taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.[8]

That report allowed as creditable for 1961 the Argentina Corporation Income Tax and Excess Profits Tax in the amount of $226,196.17. It disallowed the following Argentina taxes as noncreditable for that year:

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[7] *See* n. 5, *supra*.

[8] It has been stipulated between the parties that the allowance of Philippines taxes in the amount of $106,108.19 as deductions rather than credits for 1961, thereby reducing plaintiffs taxable income from Philippines sources, had no effect on the limitation on plaintiff's foreign tax credit under section 904 because of the election by plaintiff with respect to 1961 of the overall limitation pursuant to section 904(a)(2).

Tax in Substitution of Surcharge on Free Transfer of Property	$ 3,982.49
City of Buenos Aires Tax on Profit-Making Activities	7,242.86
Contribution to Bankers' Institute for Social Services	28,756.36
	$39,981.71

The $39,981.71 of Argentina taxes disallowed as non-creditable for 1961 were allowed as deductions under section 164.

Plaintiff duly filed a written protest of certain of the adjustments proposed in the Revenue Agents' reports dated March 26 and May 5, 1964, including the adjustments relating to Thailand and Philippines taxes paid for 1959 and 1960, and to Thailand, Philippines, and Argentina taxes paid for 1961. On January 3, 1966, plaintiff received from defendant an Appellate Division audit statement revising certain of the adjustments proposed in those reports. However, no change was made in the adjustments relating to Thailand taxes for 1959, 1960, and 1961, to Philippines taxes for 1960 and 1961, or to Argentina taxes for 1961. The audit statement did change the Philippines tax adjustment relating to 1959 but only by increasing the section 904 limitation by $12.71 to a total for 1959 of $616,222.79. That statement determined net overassessments of $1,333,070.97 and $1,329,063.21 for 1959 and 1960, respectively, and a net deficiency of $188,-967.82 for 1961.

On or about March 16, 1966, plaintiff executed and delivered to the Internal Revenue Service Form 870-AD,

covering the taxable years 1959, 1960, and 1961, in which the following qualification was stated:

> Taxpayer agrees to the settlement of all issues except that the taxpayer reserves the right to file claims or prosecute an action for the recovery of the deficiency or reduced overassessments applicable to foreign taxes disallowed as foreign tax credits under section 901(b) of the 1954 Code.
>
> Taxpayer's agreement on the reverse side that no claim for refund or credit shall be filed or prosecuted is hereby made expressly subject to taxpayer's reserved right as expressed in the preceding paragraph.

The Commissioner of Internal Revenue by his duly authorized representative executed the Form 870-AD thereby accepting plaintiff's offer to accept the proposed overassessments for 1959 and 1960 and the proposed deficiency for 1961, subject to plaintiff's express reservation contained therein. Plaintiff is not barred by the terms of the Form 870-AD from prosecuting subject claims for relief.

On July 13, 1966, the District Director, pursuant to the Form 870-AD, scheduled a refund to plaintiff of federal income tax for 1959 of $1,333,070.97, together with interest thereon of $436,892.06, and for 1960 of $1,329,063.21, together with interest thereon of $404,836.29. The 1961 deficiency in the amount of $188,967.82 was credited against the amount of the refund and the balance of the refund duly paid to plaintiff.

Plaintiff's respective claims for refund for 1959 and for 1960 were each allowed in part, but to the extent to which each pertained to credit for the Thailand and Philippines

taxes determined to be noncreditable in the Revenue Agent's report of March 26, 1964, each claim was disallowed by the Commissioner of Internal Revenue acting by and through the District Director by a certified letter, mailed to plaintiff on June 21, 1966, for 1959, and on July 26, 1966, for 1960. Plaintiff's petition in Docket No. 184-68, covering taxable years 1959 and 1960, was filed June 19, 1968.

On July 9, 1968, plaintiff timely filed with the District Director its claim for refund, Form 843, of federal income tax allegedly overpaid by it for 1961. More than 6 months had elapsed after filing of such claim before plaintiff's petition was filed in Docket No. 138-69 on March 7, 1969, covering taxable year 1961.

No action is now pending or has ever been taken on plaintiff's claims as described herein by Congress or by any department of defendant or in any judicial proceeding other than as described herein. Plaintiff is now and has always been the sole owner of the claims alleged herein and has made no transfer or assignment of those claims or any part thereof or any interest therein. No part of those claims has been refunded, repaid or credited to plaintiff.

In summary, the Internal Revenue Service has allowed (except for an inadvertent error on Thailand Profit Remittance Tax for 1959[9]) the following foreign taxes as credits against plaintiff's federal income tax liabilities pursuant to section 901 for the taxable years in issue, which treatment is not now in dispute: Thailand Com-

[9] *See* n. 4, *supra*.

panies Income Tax and Profit Remittance Tax, Philippines Tax on Foreign Corporations, and Argentina Corporation Income Tax and Excess Profits Tax. In addition, the parties have stipulated that the Philippines Residence Tax was not creditable, but properly allowed as a deduction under section 164. Thus, only the following taxes remain in dispute:

> Kingdom of Thailand: Business Tax, Type 1 and Type 2, Municipal Tax, and Receipts Tax.
>
> Republic of the Philippines: Tax on Banks.
>
> Republic of Argentina: Tax in Substitution of Surcharge on Free Transfer of Property, City of Buenos Aires Tax on Profit-Making Activities, and Contribution to the Bankers' Institute for Social Services.

It is my opinion that plaintiff is entitled to recover only as to the Thailand Business Tax, Type 1 and Type 2, the Philippines Tax on Banks, and the Argentina City of Buenos Aires Tax on Profit-Making Activities. Of course, plaintiff is entitled to recover on the inadvertent disallowance of Thailand Profit Remittance Tax for 1959.

With respect to the Thailand Municipal Tax, the Thailand Receipts Tax, the Argentina Tax in Substitution of Surcharge on Free Transfer of Property, and the Argentina Contribution to the Bankers' Institute for Social Services, it is my conclusion that plaintiff has failed to meet its burden of proof or persuasion[10] that any of such

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[10]Rule 125 of this court provides that the determination of foreign law shall be treated as a ruling on a question of law, but the court or trial commissioner, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 133, the reception of evidence rule.

foreign taxes is creditable under section 901, as being an income tax accrued and payable to a foreign country.

With respect to the Thailand Municipal Tax and the Thailand Receipts Tax, plaintiff cites no provisions of the translated portions of The Revenue Code of Thailand attached to the stipulation of facts filed herein, nor are any provisions found therein which seem to pertain to such laws. There is no other testimony or evidence concerning the nature of such taxes. Plaintiff's position is that those taxes present no independent legal issues since allegedly each is calculated as a flat percentage of plaintiff's annual liability for the Thailand Business Tax, citing Rev. Rul. 70-21, 1970-1 CUM. BULL. 158, for the proposition that in that situation, the creditability of the dependent foreign tax depends upon the creditability of the principal tax.[11] In response to defendant's correct assertion that no evidence was adduced as to the nature of those taxes, nor as to the nature of plaintiff's liability for such taxes, plaintiff's reply is that the determination of foreign law is a question of law as to which the court and the trial commissioner may consider relevant materials from any source. Efforts by the trial commissioner to obtain a reliable and authoritative translation of such laws have proved unsuccessful. Rule 125 cannot reasonably be interpreted to shift the burden on the court or the trial commissioner to search for documentation necessary for determination of a question of foreign law, particularly in the circumstances where the litigant before the court conducts a business in the foreign country, subject to its laws.

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[11]Plaintiff's opening brief to the trial commissioner at 12; plaintiff's reply brief to the trial commissioner at 2.

With respect to the Argentina Tax in Substitution of Surcharge on Free Transfer of Property, it is sufficient to observe that such tax is imposed upon a corporate taxpayer annually at the rate of 1 percent of its capital and reserves. Plaintiff has wholly failed to show how or in what respect such tax was imposed upon its Argentina income in 1961. Plaintiff's distress is expressed by its statement in its opening brief that it has been unsuccessful in obtaining from its Argentina office the details of the computation of the allegedly creditable and noncreditable portions of such tax.[12]

With respect to the Argentina Contribution to the Bankers' Institute for Social Services, such tax is obviously a social security revenue measure. The Bankers' Institute, an instrumentality of the government of Argentina, administers a social security program within the banking industry. The revenue is basically derived from compulsory contributions of employees and employers within the banking industry, with the respective contributions being 2 percent of monthly salaries received and paid. By amendment effective March 7, 1957, each bank was required to pay contributions equal to 2 percent of the total amounts received by it in respect of interest and commissions. The proof with respect to the amendment is fragmentary, and plaintiff's position cannot be sustained that the 1957 amendment repealed the previous provisions imposing contributions upon the employer to match the required contributions of employees. In any event, the

[12]Plaintiff's opening brief to the trial commissioner at 14–15, 15 at n. 9.

tax of 2 percent of amounts received by a bank by way of interest and commissions, which tax was in whole or in part the compulsory contributions of the bank to funds otherwise contributed by the bank's employees to sustain a government social security program for bank employees, cannot reasonably be equated to income tax under United States concepts.

Much broader in the scope of its imposition of taxes on income is the Thailand Business Tax, Type 1 and Type 2. The Thailand Business Tax provisions in effect in the taxable years in issue are set forth in Chapter IV of Title II of The Revenue Code of Thailand, a translated copy of which is set forth in Exhibit 8 attached to the stipulation of the parties filed herein.

Section 78 of the Business Tax provisions defines persons engaged in business as those listed in the Business Tax Rate Schedule of such revenue law, and states that such persons have the duty to pay business tax on the "gross takings" for each tax month at the rates provided in such schedule. Section 79 defines "gross takings" from the business of banking as (a) interest, discounts, fees or service charges, and (b) profit, before the deduction of any expense, from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

As to the category of business designated as "banking," the Business Tax Rate Schedule describes such business as savings banks other than that of the government, commercial banking under the law on commercial banking or the business of those who regularly do business similar to that of a commercial bank such as lending money, giving

guarantees, currency exchange, issuance, purchase or sale of notes, foreign remittance by various means.

The Business Tax Rate Schedule imposes taxes of two designated types described as follows:

Type 1 Interest, discounts, fees or service charges.

Type 2 Profit before the deduction of any expenditure from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

As to Type 1 of the Business Tax on banking, the designated rate of tax is 2.5 percent of gross takings, and as to Type 2, 10.5 percent of gross takings.

The parties agree that the Thailand Business Tax, Type 1 and Type 2, is a tax on the gross receipts of banking, and it is so concluded. Obviously, the tax is imposed upon a broad spectrum of the business activities of a bank.

The City of Buenos Aires Tax on Profit-Making Activities in Article 115 imposes a tax on the gross receipts of banks, insurance, savings and loan and security and investment companies, and in Article 121 provides that in the case of banks and other lending institutions, "the taxable amount shall be composed of interest, discounts, profits from non-exempt taxable securities and other revenue, resulting from profits and remuneration for services received in the course of the last business year."

The Philippines Tax on Banks in section 249 provides that there shall be collected a tax of 5 percent on the gross receipts derived by all banks doing business in the Philippines from interest, discounts, dividends, commis-

sions, profits from exchange, royalties, rentals of property, real and personal, and all other items treated as gross income under section 29 of the National Revenue Code. Section 29 defines "gross income" as gains, profits, and income derived from any source whatever.

Section 901 of the Internal Revenue Code of 1954, insofar as it is relevant herein, provides:

> § 901. Taxes of Foreign Countries and of Possessions of United States.
>
> (a) *Allowance of credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) * * *
>
> (b) *Amount allowed.*—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):
>
> (1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *
>
> [68A Stat. 285 (1954), as amended by section 3(a), Act of September 14, 1960, P.L. 86-780, 74 Stat. 1010, 1013 (1960).][13]

[13]Section 3(a) of the Act of September 14, 1960, *supra*, amended subsections (a) and (b) of section 901 by striking out "the limitation of section 904" and inserting in lieu thereof "the applicable limitation of section 904." 74 Stat. at 1013. Section 4 of that Act provided that the amendment applied with respect to taxable years beginning after December 31, 1960. *Ibid.*

It is now well settled that the question of whether a foreign tax is an income tax within the meaning of section 901(b)(1) must be decided under criteria established by our revenue laws and court decisions, and that the foreign tax must be the substantial equivalent of an income tax as the term is understood in the United States. *Missouri Pacific R.R. v. United States,* 183 Ct. Cl. 168, 175, 392 F. 2d 592, 597 (1968); *Allstate Ins. Co. v. United States,* 190 Ct. Cl. 19, 27, 419 F. 2d 409, 413-414 (1969).

An income tax is a direct tax on income. *Brushaber v. Union Pacific R.R.,* 240 U.S. 1 (1916). In *Stratton's Independence, Ltd. v. Howbert,* 231 U.S. 399, 415 (1913), the Supreme Court stated that:

> • • • • • • • • • • • • • • • "income" may be defined as the gain derived from capital, from labor, or from both combined, • • • • • • • • • • • • • • •

In *Eisner v. Macomber,* 252 U.S. 189, 207 (1920), the Supreme Court reaffirmed that definition as follows:

> • • • • • • • • • • • • • • • "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, • • • • • • • • • • • • • • •

Implicit in those definitions is the concept that gain is a necessary ingredient of income, and it is that concept which provides the standard for determining whether the foreign taxes here at issue are income taxes within the meaning of section 901(b)(1). In short, an income tax,

according to United States concepts, is a tax based on gain to the taxpayer.

Section 61 defines gross income to mean "all income [gain] from whatever source derived." However, income is not the same as gross receipts. *Allstate Ins. Co. v. United States, supra.* As stated by the Supreme Court in *Doyle v. Mitchell Bros. Co.,* 247 U.S. 179, 185 (1918):[14]

> • • • • • • In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.
>
> • • • • •

It follows that where no exclusions from gross receipts are thus required, gross receipts represent the taxpayer's gain measured by section 61. See *Leslie A. Sutor,* 17 T.C. 64, 67-68 (1951).

It is also well-settled doctrine that the power to tax income extends to the gross income, and whether or to

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[14]Also, generally, 1 MERTENS, LAW OF FEDERAL INCOME TAXATION § 5.10 at 35–36 (1969) (footnotes omitted), where it is stated:

> • • • • •
>
> To say that items of gross income may be taxed is not the same as to say that under all circumstances the courts would countenance a tax on gross receipts. The terms "gross income" and "gross receipts" are not synonymous. "Gross receipts" is a broader term, including within it receipts which may constitute capital as well as income, and, • • • returns of capital may not be taxed. Thus it is recognized that the cost of goods sold is to be excluded from gross receipts in arriving at gross income. • • •
>
> • • • • •

what extent deductions shall be allowed depends upon legislative grace. *New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1934); *Deputy v. du Pont,* 308 U.S. 488, 493 (1940). The gain which may be the subject of an income tax does not necessarily require profit in the usual sense. *Ritter v. United States,* 183 Ct. Cl. 875, 890, 393 F.2d 823, 832 (1968), *cert. denied,* 393 U.S. 844 (1968).

Thus, inquiry must be made to determine whether, on the facts and circumstances of this case, plaintiff's gross receipts of the items subject to the Thailand Business Tax, Type 1 and Type 2, the Philippines Tax on Banks and the City of Buenos Aires Tax on Profit-Making Activities represent gross income to plaintiff.

Such an inquiry is guided by Reg. § 1.61-3, defining gross income derived from business. That section of the regulation provides, insofar as it is relevant herein, that:

> (a) *In general.* In a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. Gross income is determined without subtraction of depletion allowances based on a percentage of income, and without subtraction of selling expenses, losses, or other items not ordinarily used in computing cost of goods sold. The cost of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer.

Reg. § 1.61-3(a) suggests that in a non-manufacturing, non-merchandising or non-mining business where cost of goods sold is not taken into account, gross receipts is the same as gross income.

A recent revenue ruling by defendant's Internal Revenue Service is in accord. Rev. Rul. 70-347, 1970 Int. Rev. Bull. No. 27, at 30, dealt with the determination of gross income of a domestic corporation that owned and operated a railway system in South America. In that ruling, the Service reasoned as follows:

> • • • • •
>
> Section 61 of the Code sets forth the general definition of gross income as meaning all income from whatever source derived. Section 1.61-3 of the Income Tax Regulations in defining "gross income defined [sic] from business" states that gross income from a manufacturing, merchandising, or mining business, where cost of goods sold is taken into account, is determined without subtraction of selling expense, losses, or other items not ordinarily used in computing cost of goods sold. This would indicate that in other businesses where services are sold, such as in the instant case, gross revenue and gross income are synonymous. * * *
>
> • • • • •

Defendant seeks to distinguish Rev. Rul. 70-347, *supra*, from the instant situation on the ground that banks "generate most of their revenues from loans, which have costs associated with the use of the depositors' funds."[15] That ruling is not so distinguishable. It may as easily be said that railways generate most of their revenues from providing transportation which clearly has associated costs. If defendant is attempting to attribute the quality of cost of goods sold to the costs associated with the use of depositors' funds, such an argument must be rejected

[15]Defendant's brief to the trial commissioner at 28.

for the reason that plaintiff does not sell a material product to which direct costs can be allocated. *Rayburn E. Hahn,* 30 T.C. 195, 197-198 (1958), *aff'd per curiam,* 271 F.2d 739 (5th Cir. 1959).

Defendant relies heavily on *Allstate Ins. Co. v. United States, supra.* In fact, it contends that this court's decision in that case is controlling and applicable to plaintiff.[16] However, defendant's reliance is misplaced for the reason that *Allstate* is distinguishable on its facts from the situation at hand. *Allstate* dealt with a Canadian tax on the gross amount of premiums collected by an Illinois stock casualty insurance company in Canada. The income taxation of insurance companies in the United States is *sui generis.* As a stock casualty insurance company, *Allstate's* gross income would not be determined under section 61, but pursuant to section 832(b)(1). That section provides insofar as it is relevant herein, as follows:

§ 832. INSURANCE COMPANY TAXABLE INCOME.

* * * * *

(b) *Definitions.*—In the case of an insurance company subject to the tax imposed by section 831—

(1) *Gross income.*—The term "gross income" means the sum of—

(A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, * * *

* * * * *

(3) *Underwriting income.*—The term "underwriting income" means the premiums earned on insurance

[16]Defendant's brief to the trial commissioner at 14–15.

contracts during the taxable year less losses incurred and expenses incurred.

(4) *Premiums earned.*—The term "premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

(A) From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance.

(B) To the result so obtained, add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year.

For purposes of this subsection, unearned premiums shall include life insurance reserves, as defined in section 801(b), pertaining to the life, burial, or funeral insurance, or annuity business of an insurance company subject to the tax imposed by section 831 and not qualifying as a life insurance company under section 801. * * *

* * * * *

Reg. § 1.801-3(e) defines "unearned premiums" as follows:

(e) *Unearned premiums.* The term "unearned premiums" means those amounts which shall cover the cost of carrying the insurance risk for the period for which the premiums have been paid in advance. Such term includes all unearned premiums, whether or not required by law.

In other words, "unearned premiums" is "that portion which the company has not yet had time to earn or, more

precisely, that portion paid by the policyholder which must be returned upon the cancellation of the policy, and which is in direct proportion to the unexpired time which the policy is to run." 8 MERTENS, LAW OF FEDERAL INCOME TAXATION § 44.47, at 202 (1970).

In light of the statutory scheme represented by section 832 for determining the gross income of certain insurance companies, it is clear that the Canadian tax on the gross amount of premiums collected which failed to take such items as unearned premiums into account was a tax on gross receipts as distinguished from a direct tax on income within our concepts.

Other cases cited by defendant as very similar to the one at bar are distinguishable also for the reason that the foreign taxes involved therein were not imposed on income within our concepts. *Keasbey & Mattison Co. v. Rothensies,* 133 F.2d 894 (3d Cir. 1943), *cert. denied,* 320 U.S. 739 (1943), dealt with a Quebec tax levied on the value of the mine's output. *Commissioner v. American Metal Co.,* 221 F.2d 134 (2d Cir. 1955), *cert. denied,* 350 U.S. 829 (1955), involved a Mexican tax laid on the production of metals. The *Mallouk* case, 34 B.T.A. 269 (1936) involved a Philipines tax computed on the value of the goods exported.

Furthermore, the Service has ruled at various times that foreign taxes on items of gross receipts similar to those subject to the Thailand Business Tax, Type 1 and Type 2, Philippines Tax on Banks and City of Buenos Aires Tax on Profit-Making Activities were creditable income taxes within the meaning of present section 901. *E.g.,* I.T. 2620, XI-1 CUM. BULL. 44 (1932) (Mexican tax

on receipts in the form of interest or rents)[17]; I.T. 3385, 1940-1 CUM. BULL. 103 (Mexican tax on interest)[18]; I.T. 4013, 1950-1 CUM BULL. 65 (Brazilian tax on the gross earnings from interest and dividends); I.T. 4025, 1950-2 CUM. BULL. 50 (Peruvian tax on all income derived from credit operations carried on in the nation; Peruvian tax upon income derived from interest on credit operations, from rural and urban property, from non-commercial professional profits and from compensation for personal services rendered in Peru)[19]. Defendant seeks to distinguish those rulings on the same ground as Rev. Rul. 70-347, *supra*. For reasons already given, the rulings are not so distinguishable.

On the facts and circumstances of the case at hand, plaintiff's gross receipts of the items subject to the Thailand Business Tax, Type 1 and Type 2, Philippines Tax on Banks and City of Buenos Aires Tax on Profit-Making Activities represent gross income to plaintiff. A tax based on such gross income is an income tax within United States concepts, *New Colonial Ice Co. v. Helvering, supra,* and, therefore, is a creditable tax under section 901, *Sea-*

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[17]I.T. 2620, *supra*, and I.T. 4025, *supra*, were declared obsolete in Rev. Rul. 70–293, 1970–1 CUM. BULL. 282. A declaration of obsolescence means that a particular ruling is no longer determinative with respect to future transactions. It does not mean that the conclusion or underlying rationale has ne current applicability. Rev. Proc. 67–6, 1967–1 CUM. BULL. 576.

[18]In the case of *Missouri Pacific R.R. v. United States, supra,* 183 Ct. Cl. at 176, 392 F. 2d at 598, the court made the following statement concerning I.T. 2620, *supra,* and I.T. 3385, *supra:*

> Thus, these rulings seem to place in a special category income from interest and rents, as if this type of increment from capital represents a classical flow of "income" which requires no deductions.

[19]*See* n. 17, *supra.*

train Lines, Inc., 46 B.T.A. 1076 (1952); *Santa Eulalia Mining Co.*, 2 T.C. 241 (1943).[20]

FINDINGS OF FACT

1. Plaintiff, Bank of America National Trust and Savings Association, was at all times stated herein and now is a national banking association duly organized and existing under the laws of the United States, with its principal office at San Francisco, California.

2. For each of the taxable years in issue (1959, 1960, and 1961), as well as for taxable year 1958, plaintiff timely filed its federal income tax return prepared under the accrual method of accounting and on a calendar year basis.

3. At all times during 1959, 1960, and 1961, plaintiff conducted from its branch in Bangkok, Thailand, a general banking business including, but not limited to, the making of commercial, real estate and personal installment loans, the rendering of trust department and property management services, foreign exchange transactions, the issuance of letters of credit, guarantees, travelers checks and cashiers' checks, and acceptance of trade paper.

At all times during 1958[1] through 1961, plaintiff conducted a like business from its branch in Manila, Republic of the Philippines.

At all times during 1961, plaintiff conducted a like business from its branch in Buenos Aires, Argentina.

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[20]Defendant has conceded at page 32 of its brief to the trial commissioner "that it is possible for a foreign government to levy more than one creditable income tax against the same taxpayer."

[1]The year 1958 is involved only because of a Philippines tax credit carry-over from that year to 1959.

4. Plaintiff accrued and paid to the Kingdom of Thailand for 1959, 1960, and 1961 taxes imposed on its Bangkok branch operations by the Revenue Code and laws of Thailand as follows:[2]

1959

Revenue Code, Section 65, Division 3, Chapter IV, Title II (hereinafter referred to as Companies Income Tax)	$117,041.59
Revenue Code, Section 70 bis (hereinafter referred to as Profit Remittance Tax)	29,495.62
Revenue Code, Section 78, Division 1, Chapter IV, Category 12 of Business Tax Schedule (hereinafter referred to as Business Tax):	
Type 1	17,574.78
Type 2	14,494.28
Profit Remittance Tax	676.18
Thailand Municipal Tax	3,206.91
Receipts Tax	366.44
	$182,855.80

1960

Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
Business Tax:	
Type 1	22,604.89
Type 2	10,078.48
Thailand Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$249,734.35

[2]All taxes paid to foreign countries as described herein were imposed on and paid by plaintiff in foreign currencies. Since the conversion rates between the foreign currencies and U.S. dollars are not in dispute, the amounts of the foreign taxes will, for convenience, be stated solely in U.S. dollars.

1961

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
Business Tax:	
Type 1	21,246.55
Type 2	21,196.38
Thailand Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$275,345.10

5. For each of the years 1959, 1960, and 1961, the Companies Income Tax was the generally imposed income tax on all corporations operating in the Kingdom of Thailand. The Business Tax, Type 1 and Type 2, Municipal Tax and Receipts Tax were all taxes imposed separate and apart from, and in addition to, the Companies Income Tax. Plaintiff was not exempt from payment of the Companies Income Tax for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Companies Income Tax deductions under section 65 bis of the Thailand Revenue Code for the amount of the Business Tax, Type 1 and Type 2, Municipal Tax and Receipts Tax which it paid.

6. The Thailand Business Tax provisions in effect in the taxable years in issue are set forth in Chapter IV of Title II of The Revenue Code of Thailand compiled and translated by the Translation and Secretarial Office of the Kingdom of Thailand. A copy of the portions of such overall translation deemed relevant by the parties is Exhibit 8 attached to the stipulation of the parties filed herein.

Section 77 of the Business Tax provisions defines "business" as meaning "engaging in business, trade, industry, agriculture, production, importing, exporting or in the rendering of services for gain." Persons engaged in business are defined as natural persons, juristic persons and bodies of persons as prescribed in the Business Tax Rate Schedule engaged in the categories of business prescribed therein.

Section 78 provides in pertinent part as follows:

> Persons engaged in business, as listed in the Business Tax Rate Schedule annexed to this chapter, have the duty to pay business tax on the gross takings for each tax month at the rates given in the said Schedule of Business Tax Rate Schedule.

Section 79 defines "gross takings" in pertinent part as follows:

> Gross takings means money, property, consideration or any benefit of value received or receivable whether within or outside the Kingdom in connection with engaging in business, with the exception of
>
> * * * * *
>
> (3) gross takings from the business of banking, that is to say
>
> (a) interest, discounts, fees or service charges, and
>
> (b) profit, before the deduction of any expense, from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances;

The Business Tax Rate Schedule has four columns: (1) Category of Business, (2) Particular Business, (3) Person

Engaged in Business under a Duty to Pay Business Tax, and (4) Rate of Tax as Percentage of Gross Takings.

Item 12 of the Category of Business column is "Banking," described in the Particular Business column as follows:

> Savings banking other than that of the government, commercial banking under the law on commercial banking or the business of those who regularly do business similar to that of a commercial bank such as lending money, giving guaranties, currency exchange, issuance, purchase or sale of notes, foreign remittance by various means including "poi kuan" or "huay tua".
>
> Type 1 Interest, discounts, fees or service charges.
>
> Type 2 Profit before the deduction of any expenditure from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances.

As to Type 1 of the Business Tax on banking, the designated rate of tax is 2.5 percent of gross takings, and as to Type 2, 10.5 percent of gross takings.

7. Plaintiff accrued and paid to the Republic of the Philippines for the years 1958 through 1961 taxes imposed on its Manila branch operations by the National Internal Revenue Code and laws of the Philippines as follows:

1958

National Internal Revenue Code, Section 24(b), Chapter III, Title II (hereinafter referred to as Tax on Foreign Corporations)	$369,126.56
National Internal Revenue Code, Section 249, Title VIII (hereinafter referred to as Tax on Banks)	122,932.74
Section 2 of Commonwealth Act No. 465 (hereinafter referred to as Residence Tax)	845.61
	$492,904.91

1959

Tax on Foreign Corporations	$439,031.32
Tax on Banks	132,396.26
Residence Tax	981.06
	$572,408.64

1960

Tax on Foreign Corporations	$259,540.67
Tax on Banks	84,595.15
Residence Tax	656.67
	$344,792.49

1961

Tax on Foreign Corporations	$328,863.00
Tax on Banks	105,451.52
Residence Tax	656.67
	$434,971.19

8. For each of the years 1959, 1960, and 1961, the Tax on Foreign Corporations was the generally imposed income tax of the Republic of the Philippines on all foreign corporations doing business there. The Tax on Banks was a tax imposed separate and apart from, and in addition to, the Tax on Foreign Corporations. Plaintiff was not exempt from payment of the Tax on Foreign Corporations for any of the years 1959 through 1961. For each year, however, it claimed and was allowed in computing its net or taxable income subject to the Tax on Foreign Corporations a deduction under section 30(c) of the Philippines National Revenue Code for the amount of the Tax on Banks which it paid.

9. The National Internal Revenue Code and the laws of the Philippines in effect throughout the taxable years in issue and only insofar as relevant herein, provide as follows:

> SEC. 29. *Gross income.*—(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, individuals, securities, or the transactions of any business carried on for gain or profit, or gains, profits, and income derived from any source whatever.
>
> • • • • •
>
> SEC. 249. *Tax on banks.—There shall be collected a* tax of five *per centum* on the gross receipts derived by all banks doing business in the Philippines from

interests, discounts, dividends, commissions, profits from exchange, royalties, rentals of property, real and personal, and all other items treated as gross income under section twenty-nine of this Code.

* * * * *

10. The Philippines Tax on Banks (Section 249 above) was enacted in its present form on October 1, 1946, by section 3 of Rep. Act No. 39. Each bill presented to the Philippines Congress is accompanied by an "Explanatory Note" which is prepared by the Congressman or Senator who introduces the bill and is intended to explain the purpose of the proposed legislation. The Explanatory Note for H.B. No. 730, which became Rep. Act. No. 39, provided, insofar as it is relevant herein, that:

> Section 3 of the bill amends section 249 of the Tax Code by repealing the present taxes on deposits, circulation, and capital of banks, and by imposing, in lieu thereof a tax of 5% on the gross income of these institutions. The present taxes now imposed on banks are antiquated and have no direct relation to their earnings or to their ability to pay. The tax on deposits has a tendency to discourage persons from depositing their savings in banks. A tax of 5% on the gross income of banks is considered fair and reasonable, in view of the fact that the total taxes on capital, deposits and circulation now being paid by some banks amount to about 4% of their gross income. * * *

11. Plaintiff accrued and paid to the Republic of Argentina and to the City of Buenos Aires for 1961 taxes imposed on its Buenos Aires branch operations under the income tax laws of Argentina and the City of Buenos Aires as follows:

Corporation Income Tax (Law No. 11,682	$226,196.26
Tax in Substitution of Surcharge on Free Transfer of Property (Law No. 14,060, Integrated Text of 1960)	3,982.49
City of Buenos Aires Tax on Profit-Making Activities (Decree-Law No. 141/59)	7,242.86
Contribution to the Bankers' Institute for Social Services (Decree-Law No. 20.714/56)	28,756.36
	$266,177.97

12. For the year 1961, the Corporation Income Tax was the generally imposed income tax payable by the corporations doing business in Argentina. The Tax in Substitution of Surcharge on Free Transfer of Property, the City of Buenos Aires Tax on Profit-Making Activities and the Contribution to the Bankers' Institute for Social Services were taxes imposed separate and apart from, and in addition to, the Corporation Income Tax. Plaintiff was not exempt from payment of the Corporation Income Tax for 1961. However, it claimed and was allowed in computing its net or taxable income subject to the Corporation Income Tax deductions for the amounts of the above-mentioned taxes which it paid. The deduction for the Tax in Substitution of Surcharge on Free Transfer of Property was pursuant to Article 10, Section I, of the Argentina Substitute Inheritance Tax. The deduction for the City of Buenos Aires Tax on Profit-Making Activities was pursuant to Article 62(b) of the Corporation Income Tax. The deduction for the Contribution to the Bankers'

Institute for Social Services was pursuant to Article 62(h) of the Corporation Income Tax.

13. The City of Buenos Aires Tax on Profit-Making Activities in effect throughout 1961 provides in pertinent parts as follows:

Art. 115

* * * * *

In the case of banks, insurance, savings and loan and security and investment companies, the tax levied shall be computed on the basis of gross receipts obtained during the business year which ended during the first preceding calendar year.

Art. 121

In the case of banks and other lending institutions which are governed by banking legislation and its supplementary provisions, the taxable amount shall be composed of interest, discounts, profits from non-exempt taxable securities and other revenue, resulting from profits and remuneration for services received in the course of the last business year.

The Argentina Tax in Substitution of Surcharge on Free Transfer of Property, in effect in 1961, imposed a corporate tax in the amount of 1 percent of plaintiff's capital and reserves. Capital reserves are defined as being the difference between the total assets and the total liabilities at the end of each financial period of the corporation, with modifications for dividend distributions, valuation of assets, and exclusions for various assets and liabilities.

The Argentina Contribution to the Bankers' Institute for Social Services, in effect throughout 1961, is a tax

collected to support functions of the Bankers' Institute as an instrumentality of government administering a social security program within the banking industry. The Bankers' Institute provides social services, such as medical coverage, rest and recuperation facilities, commissaries, and other pecuniary benefits for employees of certain private banking institutions. One principal source of funds for the Bankers' Institute is compulsory monthly contributions by the active employee, retirees and pensioners of private banking institutions in an amount of 2 percent of their total monthly salaries. A second source is compulsory contribution by the employer of funds to match the contributions of its active employees, withheld from the salaries of the employees. By amendment effective March 7, 1957, privately owned banks were also required to pay additional employer contributions equal to 2 percent of the total amounts received by them in respect of interest and commissions.

14. In each of its federal income tax returns filed respectively for taxable years 1958, 1959, and 1960, plaintiff deducted under section 164 accrued taxes payable by it to such foreign countries for that taxable year.

In its federal income tax return filed for taxable year 1961, and on the appropriate form attached thereto, plaintiff claimed foreign tax credit under section 901 in the amount of $3,405,098.17 for accrued taxes payable by it to such foreign countries for 1961. It calculated the limitation on such credit under the per country limitation provided by section 904(a)(1), as effective in 1961.

15. On January 17, 1962, plaintiff timely filed with the District Director a claim for refund of federal income

tax allegedly overpaid by it for 1958. In its claim for refund, plaintiff timely elected to take a credit under section 901, rather than a deduction under section 164, for taxes accrued for 1958 which plaintiff paid to foreign countries. Plaintiff attached to its claim the appropriate form which, among other things, reflected the accrual for 1958 and payment of Philippines taxes of $492,904.91, and claimed a credit of $259,687.46 under section 901 for such Philippines taxes after application of the limitation provided by section 904(a), as effective in 1958.

16. The District Director allowed in full plaintiff's claim for refund for 1958 to the extent it related to credit for Philippines taxes. On or about August 5, 1964, the District Director paid to plaintiff a refund, including therein the full $259,687.46 claimed with respect to such taxes.

17. On April 10, 1963, plaintiff timely filed with the District Director separate claims for refund of federal income tax allegedly overpaid by it for 1959 and 1960.

18. (a) Following an examination by the Internal Revenue Service (hereinafter referred to as the Service) of plaintiff's books and records with respect to its federal income tax returns, federal income tax liabilities and claims for refund for the years 1959 and 1960, plaintiff received from the District Director a copy of a Revenue Agent's report, dated March 26, 1964, allowing the following Thailand taxes as creditable for 1959 and 1960:

1959	
Companies Income Tax	$117,041.59
Profit Remittance Tax	29,495.62
	$146,537.21

1960	
Companies Income Tax	$149,049.18
Profit Remittance Tax	62,396.76
	$211,445.94

The following Thailand taxes were disallowed as noncreditable for those years:

1959	
Business Tax:	
Type 1	$17,574.78
Type 2	14,494.28
Municipal Tax	3,206.91
Profit Remittance Tax[4]	676.18
Receipts Tax	366.44
	$36,318.59

1960	
Business Tax:	
Type 1	$22,604.89
Type 2	10,078.48
Municipal Tax	3,268.34
Receipts Tax	2,336.70
	$38,288.41

[4]It has been stipulated between the parties that the disallowance for credit of $676.18 of Thailand Profit Remittance Tax paid by plaintiff for 1959 was an inadvertent error by the Revenue Agent. There is no dispute that that amount is an income tax for the purpose of section 901 and is, therefore, allowable as a foreign-tax credit.

The $36,318.59 and $38,288.41 of Thailand taxes disallowed as noncreditable for 1959 and 1960, respectively, were allowed as deductions under section 164.

(b) That report also allowed in full plaintiff's claim to a carry-over of $233,217.45 in Philippines tax credit from 1958 to 1959. It allowed the Philippines Tax on Foreign Corporations in the amount of $439,031.32 as creditable for 1959, but disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$132,396.26
Residence Tax[5]	981.06
	$133,377.32

The noncreditable Philippines taxes were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1959 was thereby reduced by $133,377.32, and its Philippines tax credit for 1959 was reduced to $616,210.08 after application of the limitation under section 904(a), as effective in 1959.

(c) That report allowed plaintiff a carry-over from 1959 to 1960 of Philippines tax credit of $56,038.69, rather than the $122,407.27 which plaintiff had claimed in its 1960 claim for refund. It also allowed the Philippines Tax on Foreign Corporations in the amount of $259,540.67 as creditable for 1960, but disallowed the following Philippines taxes as noncreditable for that year:

[5]It has been stipulated between the parties that the Philippines Residence Tax in the amounts of $981.06, $656.67, and $656.67 paid for 1959, 1960, and 1961, respectively, was not available for credit, but was properly allowed as a deduction.

Tax on Banks	$84,595.15
Residence Tax[6]	656.67
	$85,251.82

The noncreditable Philippines taxes paid for 1960 were allowed as deductions under section 164. Plaintiff's taxable income from Philippines sources for 1960 was thereby reduced by $85,251.82, and its Philippines tax credit was reduced to $315,579.36 after application of the limitation under section 904(a), as effective in 1960.

19. On April 29, 1964, plaintiff timely filed with the District Director a written election by which it elected to have its foreign tax credit for 1961 calculated on the basis of the overall limitation provided by section 904(a)(2), as effective in 1961. Plaintiff attached to its election the appropriate amended form which claimed foreign tax credits for 1961 totalling $3,511,311.43. The form reflected, among other things, the accrual and payment of (1) Thailand taxes of $275,345.10, (2) Philippines taxes of $434,971.19, and (3) Argentina taxes of $266,177.97, and claimed a credit under section 901 for those taxes after application of the overall limitation provided by section 904(a)(2), as effective in 1961.

20. (a) Following an examination by the Service of plaintiff's books and records with respect to its federal income tax return and federal income tax liability for 1961, plaintiff received from the District Director a copy

[6] *See* n. 5, *supra.*

of a Revenue Agent's report, dated May 5, 1964. That report gave effect to plaintiff's election of the overall limitation on the foreign tax credit and allowed the following Thailand taxes as creditable for 1961:

Companies Income Tax	$161,202.67
Profit Remittance Tax	65,856.82
	$227,059.49

It disallowed the following Thailand taxes as noncreditable for that year:

Business Tax:	
Type 1	$21,246.55
Type 2	21,196.38
Municipal Tax	4,244.29
Receipts Tax	1,598.39
	$48,285.61

The $48,285.61 of Thailand taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.

(b) That report allowed the Philippines Tax on Foreign Corporations in the amount of $328,863 as creditable for 1961. It disallowed the following Philippines taxes as noncreditable for that year:

Tax on Banks	$105,451.52
Residence Tax[7]	656.67
	$106,108.19

[7] *See* n. 5, *supra.*

The $106,108.19 of Philippines taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.[8]

(c) That report allowed the following Argentina taxes as creditable for 1961:

Corporation Income Tax	$169,747.87
Excess Profits Tax	56,448.30
	$226,196.17

It disallowed the following Argentina taxes as noncreditable for that year:

Tax in Substitution of Surcharge on Free Transfer of Property	$ 3,982.49
City of Buenos Aires Tax on Profit-Making Activities	7,242.86
Contribution to Bankers' Institute for Social Services	28,756.36
	$39,981.71

The $39,981.71 of Argentina taxes disallowed as noncreditable for 1961 were allowed as deductions under section 164.

21. Plaintiff duly filed a written protest of certain of the adjustments proposed in the Revenue Agents' reports dated March 26 and May 5, 1964, including the adjust-

[8]It has been stipulated between the parties that the allowance of Philippines taxes in the amount of $106,108.19 as deductions rather than credits for 1961, thereby reducing plaintiff's taxable income from Philippines sources, had no effect on the limitation on plaintiff's foreign tax credit under section 904 because of the election by plaintiff with respect to 1961 of the overall limitation pursuant to section 904(a)(2).

ments relating to Thailand and Philippines taxes paid for 1959 and 1960, and to Thailand, Philippines, and Argentina taxes paid for 1961. On January 3, 1966, plaintiff received from defendant an Appellate Division audit statement revising certain of the adjustments proposed in those reports. However, no change was made in the adjustments relating to Thailand taxes for 1959, 1960, and 1961, to Philippines taxes for 1960 and 1961, or to Argentina taxes for 1961. The audit statement did change the Philippines tax adjustment relating to 1959 by increasing the section 904 limitation by $12.71 to a total for 1959 of $616,222.79. That statement determined net over-assessments of $1,333,070.97 and $1,329,063.21 for 1959 and 1960, respectively, and a net deficiency of $188,967.82 for 1961.

22. On or about March 16, 1966, plaintiff executed and delivered to the Internal Revenue Service Form 870-AD, covering the taxable years 1959, 1960, and 1961, in which the following qualification was stated:

> Taxpayer agrees to the settlement of all issues except that the taxpayer reserves the right to file claims or prosecute an action for the recovery of the deficiency or reduced overassessments applicable to foreign taxes disallowed as foreign tax credits under section 901(b) of the 1954 Code.
>
> Taxpayer's agreement on the reverse side that no claim for refund or credit shall be filed or prosecuted is hereby made expressly subject to taxpayer's reserved right as expressed in the preceding paragraph.

The Commissioner of Internal Revenue by his duly authorized representative, C. E. Robinson, Chief of the Appellate Branch Office in San Francisco, executed the

Form 870-AD thereby accepting plaintiff's offer to accept the proposed overassessments for 1959 and 1960 and the proposed deficiency for 1961, subject to plaintiff's express reservation contained therein. Plaintiff is not barred by the terms of the Form 870-AD from prosecuting subject claims for relief.

23. On July 13, 1966, the District Director, pursuant to the Form 870-AD, scheduled a refund to plaintiff of federal income tax for 1959 of $1,333,070.97, together with interest thereon of $436,892.06, and for 1960 of $1,329,063.21, together with interest thereon of $404,836.29. The 1961 deficiency in the amount of $188,967.82 was credited against the amount of the refund and the balance of the refund duly paid to plaintiff.

24. Plaintiff's respective claims for refund for 1959 and for 1960 were each allowed in part, but to the extent to which each pertained to credit for the Thailand and Philippines taxes determined to be noncreditable in the Revenue Agent's report of March 26, 1964, each claim was disallowed by the Commissioner of Internal Revenue acting by and through the District Director by a certified letter, mailed to plaintiff, the one for 1959 on June 21, 1966, and the other for 1960 on July 26, 1966.

25. On July 9, 1968, plaintiff timely filed with the District Director its claim for refund, Form 843, of federal income taxes overpaid by it for 1961.

26. Plaintiff's petition in Docket No. 184-68, covering taxable years 1959 and 1960, was filed June 19, 1968, within 2 years after the denial of plaintiff's claims for refund for those years.

More than 6 months had elapsed after the filing of plaintiff's claim for refund for taxable year 1961 before plaintiff's petition was filed in Docket No. 138-69 on March 7, 1969, covering that year.

27. No action is now pending or has ever been taken on plaintiff's claims as described herein by Congress or by any department of defendant or in any judicial proceeding other than as described herein. Plaintiff is now and has always been the sole owner of the claims alleged herein and has made no transfer or assignment of those claims or any part thereof or any interest therein. No part of those claims has been refunded, repaid or credited to plaintiff.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS

28. The Thailand Business Tax, Type 1, in amounts of $17,574.78, $22,604.89 and $21,246.55 accrued and paid by plaintiff for 1959, 1960, and 1961, respectively, was an income tax within the meaning of section 901(b)(1), and, therefore, was erroneously disallowed as noncreditable pursuant to section 901(a).

29. The Thailand Business Tax, Type 2, in amounts of $14,494.28, $10,078.48 and $21,196.38 accrued and paid by plaintiff for 1959, 1960, and 1961, respectively, was an income tax within the meaning of section 901(b)(1), and, therefore, was erroneously disallowed as noncreditable pursuant to section 901(a).

30. The Philippines Tax on Banks in amounts of $132,396.26, $84,595.15 and $105,451.52 accrued and paid by plaintiff for 1959, 1960, and 1961, respectively, was an income tax within the meaning of section 901(b)(1), and,

therefore, was erroneously disallowed as noncreditable pursuant to section 901(a).

31. The City of Buenos Aires Tax on Profit-Making Activities in the amount of $7,242.86 accrued and paid by plaintiff for 1961 was an income tax within the meaning of section 901(b)(1), and, therefore, was erroneously disallowed as noncreditable pursuant to section 901(a).

32. The Thailand Profit Remittance Tax was an income tax within the meaning of section 901(b)(1), and $676.18 of such tax accrued and paid by plaintiff for 1959 was through inadvertence disallowed erroneously as noncreditable pursuant to section 901(a).

33. The Thailand Municipal Tax was not an income tax within the meaning of section 901(b)(1), and hence was noncreditable under section 901(a).

34. The Thailand Receipts Tax was not an income tax within the meaning of section 901(b)(1), and hence was noncreditable under section 901(a).

35. The Argentina Tax in Substitution of Surcharge on Free Transfer of Property was not an income tax within the meaning of section 901(b)(1), and hence was noncreditable under section 901(a).

36. The Argentina Contribution to the Bankers' Institute for Social Services was not an income tax within the meaning of section 901(b)(1), and hence was noncreditable under section 901(a).

Recommended Conclusion of Law

Based upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the

judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover on the basis of entitlement to allowance of foreign tax credits for (a) the Thailand Profit Remittance Tax for 1959 to the extent that credit for such tax was inadvertently disallowed, (b) the Thailand Business Tax, Type 1 and Type 2, for 1959, 1960, and 1961, (c) the Philippines Tax on Banks for 1959, 1960, and 1961, and (d) the Argentina City of Buenos Aires Tax on Profit-Making Activities for 1961; that plaintiff is not entitled to recover as to the other claimed foreign tax credits, and as to such claims plaintiff's petition should be dismissed; and that judgment should be entered accordingly, with the amounts of recovery to be determined in further proceedings pursuant to Rule 131(c).

Appendix C

IN THE

United States Court of Claims

No. 184–68

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION v. THE UNITED STATES

ORDER

On May 12, 1972, the court announced its opinion, 198 Ct.Cl. ___, deciding that plaintiff was entitled to recover only as to the $676.18 of Thailand Profit Remittance Tax paid and accrued for taxable year 1959, but denying all other claims of plaintiff's petitions in this case and in Docket No. 138–69. Judgment was entered accordingly, with the amount of recovery on the one allowed claim to be determined under Rule 131(c).

On July 13, 1972, the commissioner of this court filed a memorandum report, recommending that in accordance with the opinion of the court, the computation of the Internal Revenue Service of the amount of recovery pursuant to such opinion, and the acceptance of such computation by the parties, judgment be entered as set forth below. The recommendation of the commissioner is adopted by the court.

IT IS THEREFORE ORDERED that judgment be and the same is entered for plaintiff in the sum of three hundred twenty-four dollars and fifty-six cents ($324.56), plus statutory interest from the due date of plaintiff's federal income tax return for taxable year 1959.

Dated, July 21, 1972.

By THE COURT

Chief Judge

Appendix D

INTERNAL REVENUE CODE OF 1954 (26 U.S.C. § 901)

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) ALLOWANCE OF CREDIT.—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax against which the credit is allowable. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable year under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) AMOUNT ALLOWED.—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) CITIZENS AND DOMESTIC CORPORATIONS.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(2) RESIDENT OF THE UNITED STATES OR PUERTO RICO.—In the case of a resident of the United States and in the case of an individual who is a bona fide resident of Puerto Rico during the entire taxable year, the amount of any such taxes paid or accrued during the taxable year to any possession of the United States; and

(3) ALIEN RESIDENT OF THE UNITED STATES OR PUERTO RICO.—In the case of an alien resident of the United States and in the case of an alien individual who is a bona fide resident of Puerto Rico during the entire taxable year, the amount of any such taxes paid or accrued during the taxable year to any foreign country (if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country); and

(4) PARTNERSHIPS AND ESTATES.—In the case of any individual described in paragraph (1), (2), or (3) who is a member of a partnership or a beneficiary of an estate or trust, the amount of his proportionate share of the taxes (described in such paragraph) of the partnership or the estate or trust paid or accrued during the taxable year to a foreign country or to any possession of the United States, as the case may be.

(c) CORPORATIONS TREATED AS FOREIGN.—For purposes of this subpart, the following corporations shall be treated as foreign corporations:

(1) a corporation entitled to the benefits of section 931, by reason of receiving a large percentage of its gross income from sources within a possession of the United States; and

(2) a corporation organized under the China Trade Act, 1922 (15 U. S. C., chapter 4), and entitled to the deduction provided in section 941.

(d) CROSS REFERENCE.—

(1) For deductions of income, war profits, and excess profits taxes paid to a foreign country or a possession of the United States, see section 164.

(2) For right of each partner to make election under this section, see section 703 (b).

(3) For right of estate or trust to the credit for taxes imposed by foreign countries and possessions of the United States under this section, see section 642 (a) (2).